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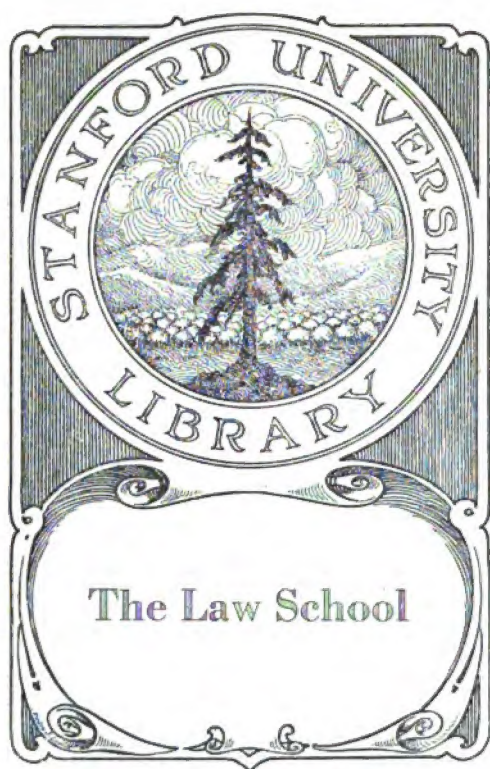
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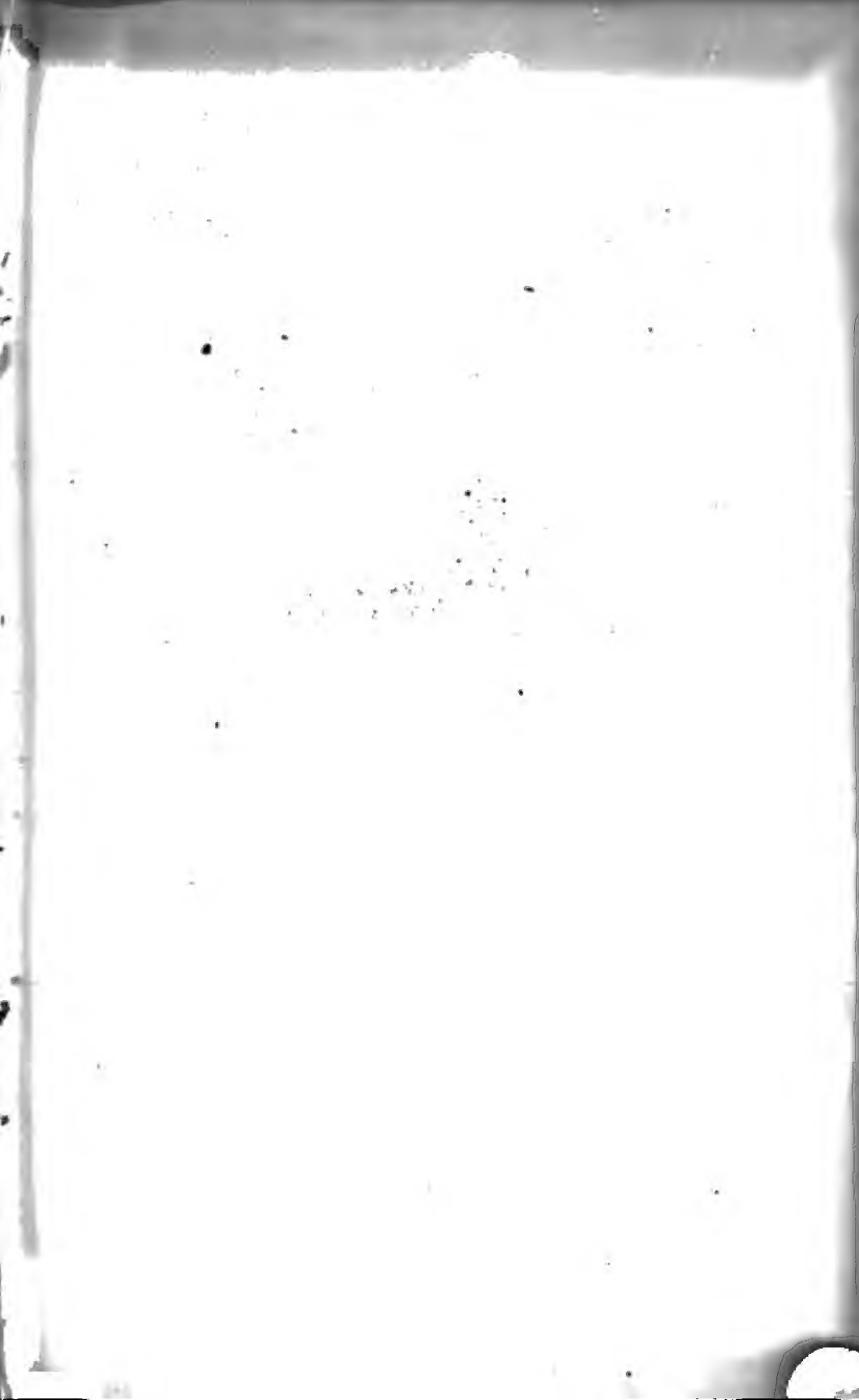
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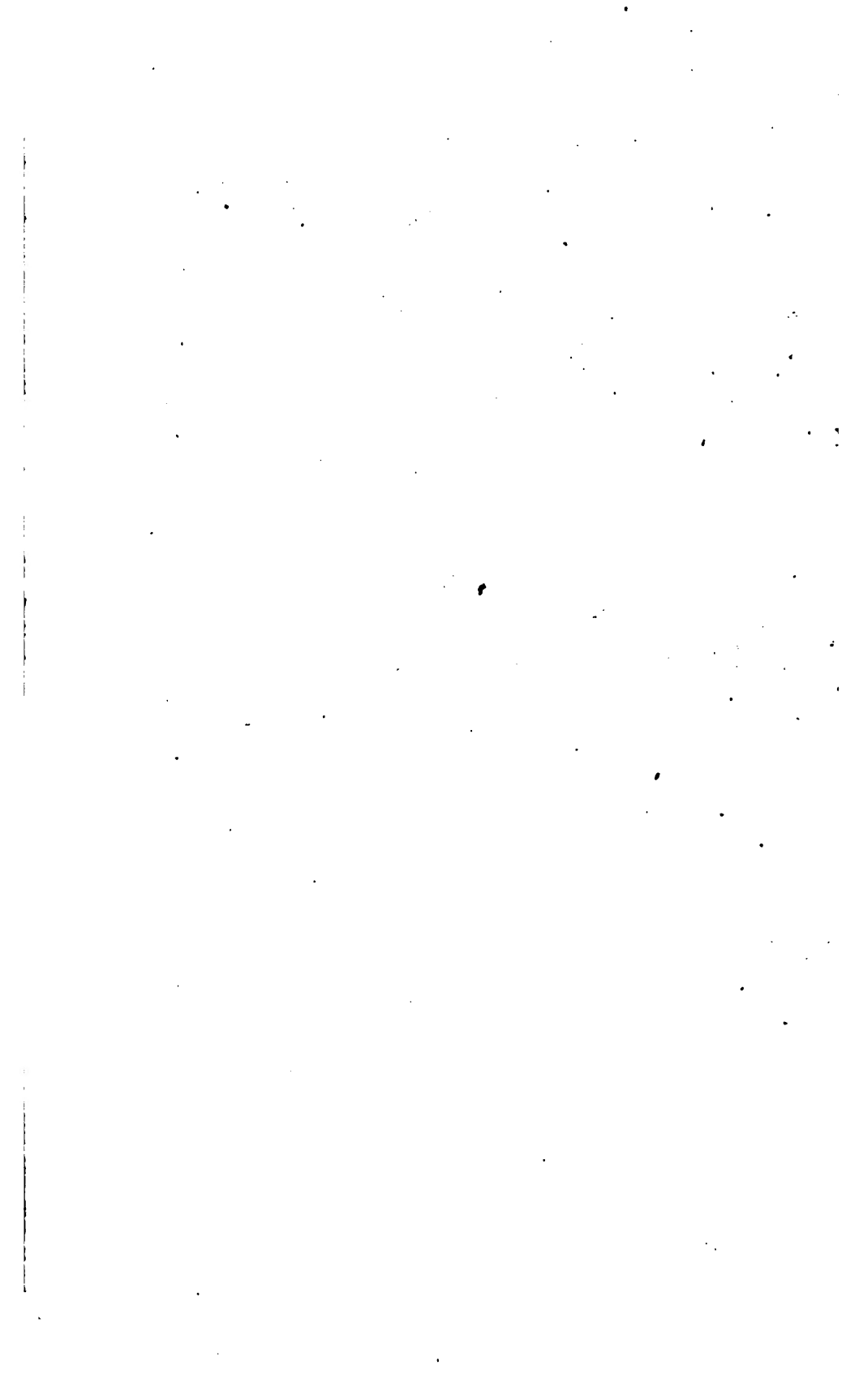
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REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

VOLUME XII.

CONTAINING

LAW REPORTS,

- 4 ADMIRALTY AND ECCLESIASTICAL, pp. 269-297.
- 10 CHANCERY APPEALS, pp. 177-417.
- 10 COMMON PLEAS, pp. 189-438.
- 2 CROWN CASES RESERVED, pp. 147-163.
- 19 EQUITY CASES, pp. 353-500.
- 10 EXCHEQUER, pp. 35-199.
- 7 HOUSE OF LORDS, pp. 364-476.
- 6 PRIVY COUNCIL CASES, pp. 245-329.
- 3 PROBATE AND DIVORCE, pp. 209-234.
- 2 SCOTCH APPEALS, 409-431.
- 10 QUEEN'S BENCH, pp. 140-278.

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1876.

NAMES OF THE JUDGES

OF THE

SEVERAL COURTS IN ENGLAND,

During the time of the decision of the cases reported in the present volume.¹

QUEEN'S BENCH.

The Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN, Bart., Ch. J.
Sir COLIN BLACKBURN, Knt.
Sir JOHN MELLOR, Knt.
Sir ROBERT LUSH, Knt.
Sir RICHARD QUAIN, Knt.
Sir WILLIAM FIELD.

COMMON PLEAS.

The Right Hon. Sir JOHN DUKE COLERIDGE
Sir WILLIAM BALIOL BRETT, Knt.
Sir ROBERT GROVE, Knt.
The Hon. GEORGE DENMAN, Knt.
Sir THOMAS DICKSON ARCHIBALD.
Sir NATHANIEL LINDLEY.

COURT OF EXCHEQUER.

The Right Hon. Sir FITZ ROY KELLY, Knt., C. B.
Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.
Sir ANTHONY CLEASBY, Knt.
Sir CHARLES EDWARD POLLOCK, Knt.
Sir RICHARD PAUL AMPHLETT, Knt.
Sir JOHN WALTER HUDDLESTON.

¹ The changes of judges in England have, as a matter of convenience, been brought down to the time of publication instead of ending with the past year. Some of the new judges may not have sat in any of the cases herein reported.

HIGH COURT OF CHANCERY

Right Hon. LORD CAIRNS, Lord Chancellor.	
Right Hon. Sir WILLIAM MILBOURNE JAMES,	} Lord Justices.
Right Hon. Sir GEORGE MELLISH,	
Hon. Sir RICHARD MALINS,	} Vice Chancellors.
Hon. Sir JAMES BACON,	
Hon. Sir CHARLES HALL,	
Right Hon. GEORGE JESSEL, Master of the Rolls.	
Hon. Sir JAMES BACON, Chief Judge in Bankruptcy.	

HIGH COURT OF ADMIRALTY.

Right Hon. Sir ROBERT JOSEPH PHILLIMORE, Knt., D. C. L.

PROBATE AND DIVORCE.

Right Hon. Sir JAMES HANNEN, Knt.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord President.	
Lord Chancellor.	
Lord Justices of the Court of Appeal in Chancery.	
Master of the Rolls.	
Vice Chancellors.	
Lord Chief Justice of the Court of Queen's Bench.	
Lord Chief Justice of the Common Pleas.	
Lord Chief Baron of the Court of Exchequer.	
Judge of the High Court of Admiralty.	
Judge of the Court of Probate.	
Sir BARNES PEACOCK,	} Paid Members.
Sir MONTAGUE EDWARD SMITH,	
Sir ROBERT P. COLLIER,	

The Prelates of the church of England, who are Privy Councillors, are members of the Judiciary Committee on Appeals to Her Majesty in Council under the church discipline act, but not otherwise.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A		PAGE.			PAGE.
A. vs. A.,	686		Charter vs. Charter,	1	
Aberdare, etc., vs. Hammett,	230		Cheetham vs. Mayor, etc.,	324	
Abrahams ads. Bank,	148		Chichester ads. Alletson,	386	
Alletson vs. Chichester,	386		Clare vs. Lamb,	399	
Andrew ads. Fulton,	76		Clyde Steam, etc., vs. Lord Advocate,	104	
Angell vs. Duke,	236		Cobequid, etc., vs. Barteaux,	201	
Anglo, etc., vs. Rennie,	345		Cole vs. North Western, etc.,	418	
Appollinaris Co. ads. Fisher,	736		Cook ads. Beynon,	769	
Archangel, etc., ads. North, etc.,	282		Currie vs. Misa,	592	
Armstrong vs. Lancashire, etc.,	508				
Arnold ads. Reynard,	766				
Aspden vs. Seddon,	773				
Aynsley vs. Glover,	726				
B			D		
Baker ads. Gearns,	760		Dawes, matter of,	830	
Bank vs. Abrahams,	148		De Bay vs. Griffin,	731	
Barned's Banking Co., matter of,	704		Dimond vs. Bostock,	763	
Batchelor ads. Hemming,	515		Dinn vs. Blake,	449	
Barteaux ads. Cobequid, etc.,	181		Dow vs. Black,	156	
Baxendale vs. London, etc.,	496		Dugdale vs. Lovering,	316	
Bettison, matter of,	654		Duke ads. Angell,	236	
Beynon vs. Cook,	769				
Birchall vs. Pugin,	458				
Black ads. Dow,	156				
Blake ads. Dinn,	449				
Bland vs. Bland,	688				
Boese ads. Murphy,	567				
Borwick ads. Threfall,	266				
Bostock ads. Dimond,	763				
Boyd vs. Phillpotts,	670				
Bradshaw vs. Lancashire, etc.,	310				
Bramton, etc., Railway, matter of,	691				
Bullock vs. Caird,	306				
Burdett ads. O'Mahoney,	22				
C			E		
Caird ads. Bullock,	306		East, etc., ads. Jebson,	358	
Carr vs. London, etc.,	364		Emma Silver Mining Co., matter of,	701	
			England, Ex parte,	711	
			F		
			Fairland vs. Percy,	678	
			Falk ads. Lockhart,	573	
			Finlinson vs. Porter,	250	
			Fisher, etc., vs. Appollinaris Co.,	736	
			Forbes' Claim, matter of,	846	
			Foulkes ads. Regina,	640	
			Fowkes vs. Pascoe,	750	
			Fox vs. Lownds,	837	

	PAGE.		PAGE.
Franklin ads. Sandill,.....	439	Lamb ads. Clare,.....	399
Fulton vs. Andrew,.....	76	Lambton, Ex parte,.....	782
		Lancashire, etc., ads. Armstrong, ..	508
G		Lancashire, etc., ads. Bradshaw, ..	310
Gallin vs. London, etc.,.....	268	Lancashire, etc., ads. Mitchell, ...	288
Gearns vs. Baker,.....	760	Larchin v. North Western, etc.,...	524
Glover ads. Aynsley,.....	726	Lariviere ads. Morgan,.....	52
Goodwin vs. Roberts,.....	525	Leather Company v. Hieronimus, ..	211
Gordon, matter of,.....	699	Liddell ads. Hinde,.....	296
Green, matter of,.....	724	Lindsay, matter of,.....	782
Greenfield vs. Reay,.....	273	Lockhart v. Falk,.....	573
Griffin ads. De Bay,.....	731	London, etc., Banking Company, ..	833
Grimoldby vs. Wells,.....	451	London, etc., ads. Baxendale,.....	496
Guardians, etc., vs. Wheelwright, ..	617	London, etc., ads. Carr,.....	364
Guibord's Case,.....	668	London, etc., ads. Gallin,	268
		London, etc., ads. Radley,.....	544
		Lord Advocate, vs. Clyde, etc.,...	104
		Lovering ads. Dugdale,.....	316
		Lownds ads. Fox,.....	837
H			
Halifax Union vs. Wheelwright, ..	617	M	
Hall vs. Nixon,.....	218	Mackenzie vs. Whitworth,	583
Hammett ads. Aberdare, etc.,.....	230	Manchester, Mayor of, ads. Cheetham,	324
Hare, Ex parte,.....	711	Marshall vs. Shrewsbury,.....	719
Harrison vs. Mexican, etc.,.....	798	Mason, matter of,.....	725
Hawker ads. Mill,	588	Mavro vs. Ocean, etc.,.....	473
Hawkins ads. Walrond,.....	406	Mayor, etc., ads. Cheetham,.....	324
Hemming vs. Batchelor,.....	515	Mayor, etc., ads. Thorn,.....	555
Hieronimus ads. Leather Co.,.....	211	Mayor, etc., ads. Wells,.....	463
Hinde vs. Liddell,	296	McManus, matter of,.....	743
Hindley Local, etc., ads. White, ..	275	Mexican, etc., ads. Harrison,.....	793
Holker vs. Porritt,.....	520	Mill vs. Hawker,.....	538
Horsford, matter of,.....	672	Miller ads. Phillips,.....	479
Husband, matter of,	830	Misa ads. Currie,.....	592
		Mitchell vs. Lancashire, etc.,.....	288
I		Morgan vs. Lariviere,	52
Ingram v. Soutten,.....	40	Mount ads. Regina,.....	181
		Murphy vs. Boese,.....	567
		Murton's Trusts, matter of,.....	724
J			
Jacobs, matter of,.....	707	N	
Jardine, matter of,	743	Nixon ads. Hall,	218
Jebsen v. East, etc.,.....	358	North ads. Jones,	326
Jeffries ads. Worthington,.....	440	North, etc., vs. Archangel, etc.,...	282
Joint Stock Discount Co., matter of,	704	North, etc., ads. Cole,.....	418
Jones v. North,	826	North, etc., ads. Gallin,.....	268
Joyce, Ex parte,.....	714	North, etc., vs. Larchin,.....	524
		North, etc., ads. Robson,.....	302
K			
Kathleen, The,.....	645	O	
Kilburn, etc., ads. Reed,.....	295	Ocean, etc., ads. Mavro,	473
King v. Pinsonneault,.....	127	O'Mahoney vs. Burdett,.....	22
		Oppert ads. Vale,.....	748
		Ousey vs. Ousey,.....	683

vii

P	PAGE.
Pascoe ads. Fowkes,.....	760
Pattillo ads. Scrutton,.....	803
Percy ads. Fairland,.....	678
Phillips vs. Miller,.....	479
Phillipotts ads. Boyd,.....	670
Pilley ads. Saint,.....	577
Pinsonneault ads. King,.....	127
Porritt ads. Holker,.....	520
Porter ads. Finlinson,.....	250
Printing, etc., Co. vs. Sampson,....	841
Prothero, matter of goods of,....	671
Pugin ads. Birchall,.....	458
R	
Radley vs. London, etc.,.....	544
Reay ads. Greenfield,.....	273
Reed vs. Kilburn, etc.,.....	295
Rennie ads. Anglo, etc.,.....	345
Rosedale, etc., ads. Tyers,.....	631
Regina vs. Foulkes,.....	640
Regina vs. Mount,.....	181
Regina vs. Taylor,.....	636
Regina vs. Vine,.....	259
Reynard vs. Arnold,.....	766
Roberts ads. Goodwin,.....	525
Robson vs. North, etc.,.....	802
Rosedale, etc., ads. Tyers,.....	631
S	
Saint vs. Pilley,.....	577
Sampson ads. Printing, etc., Co.,..	841
Sandill vs. Franklin,.....	439
Scrutton vs. Pattillo,.....	803
Seddon ads. Aspden,.....	773
Shaw's Claim, matter of,.....	691
Shrewsbury ads. Marshall,.....	719
T	
Taylor ads. Regina,.....	636
Theodor ads. Westwick,.....	280
Thorn vs. Mayor, etc.,.....	555
Threfall vs. Borwick,.....	286
Thursby vs. Thursby,.....	808
Tyers vs. Rosedale, etc.,.....	631
U	
Universal Ins. Co., matter of,....	846
University College ads. Yates,....	67
V	
Vale vs. Oppert,.....	748
Vine ads. Regina,.....	259
W	
Walrond vs. Hawkins,.....	406
Warren, Ex parte,.....	714
Wells ads. Grimoldby,.....	451
Wells vs. Mayor, etc.,.....	463
Westwick vs. Theodor,.....	280
Wheelwright ads. Guardians,	617
White vs. Hindley Local, etc.,....	275
Whitworth ads. Mackenzie,	582
Worthington vs. Jeffries,.....	440
Y	
Yates' vs. University College,.....	67

APPEAL CASES

BEFORE THE

HOUSE OF LORDS.

ENGLISH AND IRISH APPEALS.

[Law Reports, 7 House of Lords, 364.]

June 23, 25; July 24, 1874.

***WILLIAM FORSTER CHARTER, Appellant; and** [364
CHARLES CHARTER, Respondent. (¹)

Will—Description—Name—Evidence—Costs.

Evidence of the declarations of a testator as to whom he intended to benefit, or supposed he had benefited, can only be received where the description of the legatee, or of the thing bequeathed, is equally applicable, in all its parts, to two persons, or to two things. But evidence of the circumstances, the habits, and the state of his family at the time he made the will, is admissible, so as to put the court in the position of the testator, in order to ascertain the bearing and application of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can be, with sufficient certainty, applied.

Forster Charter, a Northumbrian farmer, made a will in 1859; it was drawn for him, at his request, by the vicar of the parish. The vicar knew, personally, nothing of the testator's family. The testator had had a son named Forster Charter, but this son died unmarried while yet under age. The second son, who thereupon became the elder surviving son, was named William Forster Charter. In 1850 he left home and settled in business at a place about 100 miles distant. He was never known as Forster Charter but was called William or Willie. In 1853 he went to Australia, but returned in 1856. He then resumed his former business at his previous residence, and visited his father only occasionally. It was doubtful whether they were or were not on good terms with each other. The younger surviving son was named Charles Charter. He always lived with his father, except for a very short period in 1859 or 1860, when he absented himself on account of a quarrel in the family. On his return he went on as before, assisting his father, the testator, in the farm business till the father died, which was in 1869. The testator had three daughters; two were married and living away. They were not mentioned in the will. The third was unmarried, and lived with her father. Her name was Barbara. She was mentioned in the will, but was erroneously called "Barbara Forster," though she had never been known by that double name. The testator's residence and farm were, in the will, left to "my son Forster Charter," who was made executor. This name and this description were twice repeated. The will went on to provide an annuity for the wife, to be paid "by my executor Forster Charter," as long as they should "reside together in the same house"; but "should they think proper to live separately" the "said Forster Charter" was to let her live rent free in a neighboring cottage, and furnish her, in addition to the annuity, with necessary supplies; and in case of any dispute between them as to the supplies, the decision of W. D. (a near neighbor and

(¹) Affirming 1 Eng. Rep., 249, by an equal division of the court.
12 ENG. REP. 1.

1874

Charter v. Charter.

one of the witnesses to the will) was to be final. There was a similar provision as to "Barbara Forster." Probate was granted by the provincial registrar to the 365] *elder surviving son, William Forster Charter. On a citation to recall probate, evidence was received, not only of the state, circumstances, and habits of the family, but of the declarations of the testator as to his intentions with regard to his property:

Held, that this latter evidence was inadmissible:

Held, by the Lord Chancellor and Lord Selborne, that evidence as to the state, circumstances, and habits of the family was here admissible.

And (dis. Lord Chelmsford and Lord Hatherley), that the evidence of that kind here given had the effect of correcting what was thereby shown to have been a mistake in the will, i.e., the name of the executor as there written; that the description of what was to be done, of the circumstances under which it was to be done, and of the person who was to act in doing it, of the place where the directions of the will were to be carried into effect, and all the circumstances connected therewith, pointed plainly to Charles, who had always been, and then was, resident with his father, as the person intended to carry the provisions of the will into effect; and that a mistake having been made in the use of one christian name, which the provisions in the will and the evidence, properly admissible, had corrected, the original probate had been rightfully recalled; and that Charles Charter was properly and completely shown to be the person rightfully entitled to the probate.

The difficulty having been created by the act of the testator himself, the costs of both parties were ordered to come out of the estate.

THIS was an appeal against a decision of Lord Penzance, by which a probate previously granted had been recalled.

The appellant was the elder, the respondent the younger, son of one Forster Charter, a farmer, of Woodburn Hill, in the county of Northumberland. On the 23d of June, 1859, the testator, Forster Charter, requested the Rev. Mr. Kell, then the vicar of his parish, to draw up his will. That gentleman, although not personally acquainted with the testator's family, consented to do so. He drew up a will, which appeared to have been executed on the same day when it was drawn up, and of which the following are the important parts: "I hereby nominate and appoint my son, Forster Charter, as the executor of this my will; and to him I give, &c., all my messuages, &c., for his own use and benefit, and for the use and benefit of the persons hereinafter to be named. My will is that my executor, Forster Charter, shall annually pay to Elizabeth Charter, my wife, the sum of ten pounds sterling, and at the same [time] allow my said wife her ordinary maintenance, as long as they reside together in the same house; but, should they think proper to live separately, then my will is that, besides paying *my wife the above annuity of ten pounds, the said Forster Charter shall allow my said wife, rent free, the use of the cottage at Woodburn Hill now occupied by Daniel Wood, and shall also supply her, gratis, with a reasonable quantity of bread, corn, potatoes, coals, butter, cheese, and garden produce. Should any difference of opinion arise between my said executor and my said wife," with regard to the quantity or

quality of this allowance, the matter was to "be laid before Walter Davison, shoemaker, and his decision shall be final. Moreover, my will is, that if my daughter, Barbara Forster, shall at any time be sick or in want, my said executor shall afford her such pecuniary and other aid as she may require and his own circumstances may permit," which was also to be subject to the judgment of William Davison.

The testator had had a son named "Forster Charter," but he had died some years before the date of the will, and a year or so before attaining twenty-one. The testator had, at the time of executing the will, two sons; the elder, whose full name was William Forster Charter, and the younger, whose name was Charles Charter. He had also three daughters; one named Barbara (not, as described in the will, Barbara Forster), another Margaret, and another Ursula. The latter two were married, and resided at a distance from the testator. Barbara lived in his house and was known by that name alone. The testator died in August, 1869.

The appellant William Forster Charter, while yet a young man, left his father's house, where, it was said, disputes frequently occurred between them, and in 1850 set up business for himself as a butcher at Cleator Moor, in Cumberland, about 100 miles distant from Woodburn Hill. In 1853 he went to Australia, but returned in 1856, and resumed his business at Cleator Moor, only paying an occasional visit to his father. He was never called "Forster," but always "William" or "Willie."

Probate had been granted, by the district registrar of Newcastle, in the common form, on the 16th of September, 1869, to "William Forster Charter," as executor named in the will. In August, 1870, Charles Charter cited William Forster Charter before the Court of Probate, to show cause why this grant of probate should not be recalled, on the ground that "Charles Charter is the person *appointed [367 or intended by the testator to be appointed, sole executor thereof." The appellant put in an answer to the citation, setting forth various matters to show the probability that the testator did intend to make William Forster Charter, and not Charles Charter, his devisee and executor. Affidavits were filed on both sides⁽¹⁾, some of which related to expressions and declarations made by the testator as to his intentions, others related to the state and circumstances of the members of the family, their habits, and conduct. When the case came on for hearing, the defendant's solicitors, pursuant to notice to that effect, took the objection that the

(1) The statements in the affidavits are sufficiently referred to in the judgments.

1874

Charter v. Charter.

court could not look at the affidavits for the purpose of altering the will; and Lord Penzance, having taken time to consider the arguments, decided, on the 13th of May, 1871, that the probate should be revoked. It was afterwards brought to his Lordship's attention that the arguments had been confined, by arrangement between the parties, to the admissibility of the affidavits, and he accordingly allowed a rehearing, a cross-examination of the deponents, and an argument on the effect of the evidence; and, on the 21st of November, 1871, he pronounced a final decree recalling the probate⁽¹⁾. The present appeal was then brought.

Mr. *Manisty*, Q.C., and Mr. *Bayford*, for the appellant: The first question here is whether evidence was admissible to affect the meaning of the words used in the will itself; and the next, whether the court below had put the right interpretation on the will.

A court has no right to assume anything as to a will, nor to judge as to its meaning from any considerations of probability. It is bound to seek for the real meaning of the testator in the very words he has used. That rule has been violated in this case. The court assumed that the person who drew the will was ignorant of the names of the testator's children, and so misdescribed them. But that supposition defeats itself, for if he was ignorant of them, the greater was the probability that he must have taken them direct from the testator himself; and if so, then it was probable that the testator had described his elder son as "Forster 368] *Charter," for that son's name was "William Forster Charter," but it was quite improbable that he should so describe his younger son, for that son was simply named "Charles," and not "Charles Forster," and he had never had the name of Forster attributed to him at all. There was no ground in this case for presuming a mistake to have been made, and for admitting any extrinsic evidence in order to correct it: *Bernasconi v. Atkinson*⁽²⁾; for there was nothing here which called for elucidation. In construing a will a court may explain words of doubtful meaning, but cannot strike clear words out of the will. Here "Forster" was struck out; and not only was it struck out, but another fault was committed, for "Charles" was introduced; and those things were done upon presumptions as to the intention of the testator, which presumptions were raised on inadmissible evidence, and were in absolute contradiction to the written words of the will. The authorities are adverse to

(1) 1 Eng. Rep., 249; Law Rep., 2 P. & M., 315, 322.

(2) 10 Hare, 345.

what has been done here. In *Miller v. Travers* ⁽¹⁾ there was a devise of all the testator's real and freehold estates in the county of Limerick and the city of Limerick; he had a small estate in the city but none in the county of Limerick; he had estates in the county of Clare, but the devisee was not allowed to show that there was an error, and to explain the cause of the alleged error, the court holding itself bound by the words to be found in the will ⁽²⁾. That case was expressly followed in *Doe d. Hiscocks v. Hiscocks* ⁽³⁾. The words of the will must be such as to render it matter of necessity to have recourse to extrinsic evidence to explain them; if no such necessity exists, the evidence is not admissible. In *Doe d. Hiscocks v. Hiscocks* ⁽⁴⁾ the testator had rightly described his own son John H., to whom he gave an estate for life, but he then went on to give an estate tail to his "grandson John H., the eldest son of his son John H." The son had been twice married, and by his first wife had one son Simon H., and by his second wife a son named John H., who was not therefore his *eldest* son, but was his eldest son of the second family, of which there were several other children. There evidence of the testator's expressions of intention, and also of instructions for *the will had been [369 admitted at the trial, but on that very ground, such evidence being held not to be admissible, a rule for a new trial was afterwards obtained and made absolute.

But assuming, for the sake of argument, evidence to be admissible, the conclusion drawn from it in this case was incorrect. The person seeking to recall the probate had upon him the burden of proof, and he has not sustained it; he did not show that the man whose name was in the will was not the person, or that the man whose name was not in the will was the person intended; he left both matters in doubt, he could do no more than leave them in doubt, and only sought to sustain his claim by suppositions and inferences. In both respects, therefore, the decision was erroneous.

Dr. *Tristram*, Q.C., and Mr. *Pritchard*, for the respondent: The argument on the other side shows that there was a latent ambiguity in the will. If so, extrinsic evidence was admissible to explain it. The person seeking to recall the probate has sustained the burden of proving who was the person really intended; he has shown circumstances which can leave no doubt upon that point. But, besides that, the expressions in the will distinctly point to a person who is not the appellant, and show that the name is merely a name

(1) 8 Bing., 244.

(2) See, however, *Langston v. Langston*, 9 Cl. & F., 194.

(3) 5 M. & W., 363.

introduced by mistake. In *Grant v. Grant*(¹), where the testator had described as his devisee "my nephew Joseph Grant," and the testator's own brother, and the testator's wife's brother had each a son of that name, extrinsic evidence as to the testator's conduct and circumstances was received, and the court acted on it.

In *Lord Camoys v. Blundell*(²), the whole context of the will was considered, and a mistake in a name was thereby corrected; and *Douglas v. Fellows*(³), *Wigram on Extrinsic Evidence*(⁴), *Jarman on Wills*(⁵), *Doer v. Geary*(⁶), *Doe v. Hulthwaite*(⁷), *Bernasconi v. Atkinson*(⁸), and *Drake v. Drake*(⁹) are authorities to show that such corrections may be made.

370] *Even on the face of the will itself the appellant is shown not to have been intended, for he not only did not reside in the same house with his mother, which the respondent always had done, but he resided, and had resided for years, and did so till the last, at a great distance from it. The descriptions in the will as to the places and persons, as to acts to be done, and as to possible differences should the executor and the wife think fit not to live in the same house, but to live separately, are all applicable to the respondent, and must be applied to correct the mere mistake of his name. Everything indicated that the testator looked to those on the spot, and to them alone, as the persons who were to carry his intentions into effect.

Mr. *Manisty*, in reply, denied that there was any ambiguity in this will. The name of the legatee and executor was clearly given, and there was a person who exactly answered it. That person was the appellant; and the evidence which had been received, and on which his name had been removed from the will and another substituted for it, was not in itself admissible, and even when admitted had received an effect to which it was not entitled.

July 24, 1874. LORD CHIELMSFORD: My Lords, there are two questions in this case. First, whether the state and circumstances of the testator's family at the time when the will was made show that there is a latent ambiguity in the will? Second, whether, reading the will by the light of the surrounding circumstances, the intention of the testator can be clearly ascertained from the language of the will, as explained by the extrinsic evidence?

(¹) Law Rep., 5 C. P., 380.

(²) 1 H. L. C., 778.

(³) Kay, 114; 23 L. J. (Ch.) 167.

(⁴) 4th ed., prop. v.

(⁵) 3d ed., p. 401.

(⁶) 1 Ves., 255.

(⁷) 3 B. & Ald., 632.

(⁸) 10 Hare, 345; 23 L. J. (Ch.), 184.

(⁹) 8 H. L. C., 172.

The learned judge of the Probate Court admitted parol evidence of the declarations of the intention of the testator before the making of his will with respect to the disposition of his property, and also after the will was made as to the person in whose favor he had made it. But this case does not present the sort of ambiguity in which such evidence is admissible. It is only where in a written instrument the description of the person or thing intended is applicable, with legal certainty, to each of several subjects that *ex- [371] trinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the testator: Wigram on Extrinsic Evidence (').

After hearing this evidence it is difficult to resist the impression which it produces on the mind, so as to allow of an unbiased answer being given to the question whether, to use the words of Lord Penzance, "there is sufficient to guide the court to the conclusion that the name of Forster Charter was a mistake, and that the youngest son was intended."

The testator's family, at the time the will was made, consisted of two sons, William Forster, the elder, and Charles, the younger, and three daughters, two married to husbands named Collinson and Rountree, and an unmarried daughter, Barbara, who was living with the testator. William Forster lived with his father till 1850, when he set up as a butcher at Cleator Moor, in Cumberland. He afterwards went to Australia, in 1853, and returned in 1856, and resumed his trade of a butcher at Cleator Moor. Occasionally, at distant intervals, he visited his father, who died in August, 1869. Charles always lived with his father, and assisted him in his farming business without receiving wages. He left home about the time when the will was made, which was on the 23d of June, 1869, in consequence of an unpleasant occurrence in connection with a servant girl in the family, with which it was alleged his father was much annoyed; but this is denied by the respondent, who states that he left home on account of a disagreement with his mother. The cause of his leaving home is not so important as the time when it took place, which cannot be clearly determined. The appellant says it was before the date of the will. The respondent, without naming the month, says he left for a short period in 1859 or 1860. It appears to me that the time may be ascertained with some approach to accuracy by following Charles after he left his father's house, and looking to the evidence of those to whom he went. The appellant says that Charles went first to his sister, Mrs. Col-

(') Prop. vii., s. 184, p. 160.

1874

Charter v. Charter.

linson, and afterwards came to him at Cleator Moor. Mrs. Collinson says he came to her in July, 1860, that he stayed with her three weeks, that he went from her to another married sister, and finally to Cleator Moor. Mrs. Collinson may 372] possibly be mistaken as to *the year, but she speaks positively as to its being the month of July when Charles visited her, and, therefore, whether the year was 1859 or 1860, it must have been after the will, which was made in the month of June, 1859.

The probable state of feeling of the testator towards the appellant at the time the will was made can only be conjectured from the account given of his conduct by members of the family. Mrs. Charter, the mother, gives a melancholy description of the quarrels between the father and son, which, however, she qualifies considerably in her cross-examination, saying, "Sometimes quarrels took place between my son and husband whilst my husband was under drink, and sometimes they did not take place." The sisters, Mrs. Collinson and Barbara, evidently take different sides in the contest between the brothers. Mrs. Collinson says she never recollects any serious quarrel between her father and her brother, but that they were always on good terms; but Barbara says that when her brother was at home they were always quarrelling. Mrs. Collinson, however, left home on her marriage in 1849, ten years before the will, and the appellant left his father's house in 1850, nine years before the will was made; still there is no evidence that the testator had any unkind feeling towards him after that period.

With respect to Charles, there is no evidence to show that he did not always live on affectionate terms with his father.

In these circumstances of the family the will was made by the vicar of the parish, who, it was said, was not acquainted with the names of the testator's children. I consider this wholly immaterial, even if it could be proved, as the will must be taken to have been written under the dictation of the testator. That the writer may have occasionally mistaken the testator is probable from the daughter Barbara being called in the will Barbara Forster, the latter name not being hers, nor was she ever called or known by it.

Now it is said that, examining the will by the light of the circumstances of the family, a latent ambiguity is discovered,—that the testator devises all his estates to his son Forster Charter, and appoints him the executor of his will, and directs his executor, Forster Charter, to pay to his

widow £10, and "and at the same" (the word "time" being omitted) "allow her her ordinary *maintenance so [373 long as they reside together in the same house." The ambiguity arises, as it is alleged, from there being no such person as Forster Charter, the appellant's name being William Forster, and the evidence proving that he was always called by his father William or Willie, and never Forster. It is farther said that the ambiguity appears from the will pointing to and describing a son who was living in the house with his mother, which Charles always had been, and the appellant never, since the year 1850.

Now the question is whether, from the language of the will, interpreted and explained by the extrinsic evidence, it clearly appears that the testator meant to devise his estates to Charles, and to make him his executor.

We are not permitted to conjecture that the name Forster Charter was written by the mistake of the writer, but are bound to regard it as having been dictated by the testator; and it does seem extraordinary that he should have directed this name to be inserted three times in the will, meaning it (as the respondent contends) for his son Charles; and much more so, that, intending Charles to be the object of his bounty, and Charles being at that time under his roof, and, one would have supposed, if that had been the intention immediately in his mind, he should not have recollected his proper name, but should have applied to him one which at least was nearer that of his brother than of his own. Forster was the christian name of the testator, and he seems to have been partial to the name, for he gave it first to a son who died, and repeated it at the baptism of the appellant.

Looking to the will, and construing its language without thinking of the rejected evidence, which we are bound to disregard, one might infer that when the testator was thinking of a successor to Woodburn Hill, he might have desired to perpetuate the name of Forster in connection with the property. With respect to the expression of the testator's will, that his executor, Forster Charter, should allow maintenance to the wife so long as they resided together in the same house, I am not as much impressed with it as a demonstration that the son Charles was intended, as I was in the course of the argument. If the words had been, so long as they *continue* to live together, they would have pointed more directly to Charles, but even then I should have doubted whether they *referred to him with sufficient [374 certainty. The will is most inartificially drawn, and the testator may have expected that having left Woodburn

Farm to his eldest son, he would come to reside there, and then, being desirous that his wife should have a home, he expressed his will that his executor should allow her maintenance so long as they resided together, but if they chose to live separately, that he should allow her, rent free, the use of the cottage at Woodburn Hill. It is a fact not to be overlooked that the will was in the possession of the testator for more than ten years, and it can hardly be believed that he did not look at it during that period, and yet it was left at his death without any alteration.

I see nothing in the extrinsic circumstances of the case which so certainly points to the respondent as to compel us to explain the discovered ambiguity in his favor. Indeed, I doubt whether, without the evidence which ought not to have been admitted, there is any ground for alleging that there is any latent ambiguity in the will. However this may be, and assuming such ambiguity to exist, it appears to me that it is not removed by the only extrinsic evidence that was admissible; and I, therefore, move that the decree appealed from be reversed.

LORD HATHERLEY: My Lords, the testator in this case appoints his son, Forster Charter, his executor, and devises and bequeaths to him all his real and personal estate, "for his own use and benefit, and for the use and benefit of the persons thereafter to be named." He directs his son to pay £10 a year to his wife, and at the same time to allow her her ordinary maintenance so long as they reside together in the same house, but should they think proper to live separately, then besides paying the £10 a year, the son is to allow his mother the use of a cottage and certain supplies, to be determined by a person named in the will in case of difference. The son is also to make certain allowances to the testator's daughter, Barbara Forster Charter.

It is in evidence that the testator had, at the date of his will, two sons, the one, his eldest son and heir-at-law, named William Forster Charter, the other named Charles Charter, 375] and a daughter *named Barbara Charter, not Barbara Forster Charter. He resided on his own freehold farm, and held besides the cottage referred to in his will. His wife and his son Charles had resided with him for some years, and were residing with him (as I think on the evidence) at the date of his will. His eldest son had at one time quarrelled with his father, and had gone to Australia, but had returned some years before the date of the will, and had again taken up his residence 100 miles distant from the testator. The testator had once had a son named Forster Charter, who had

died when about nineteen years old, some years before the date of the will.

Now, the facts being those that I have stated, I cannot see that any doubt or ambiguity exists in applying the words of the will, so as to authorize the introduction of parol evidence to solve that doubt. He names his "son Forster Charter" his executor, and devises his property to him. He had at the date of his will but two sons; one of them did not bear the name of Forster, the other did, though with the other name of William. I cannot think that a partial designation of the christian name can be said to occasion any doubt as between that son and one who does not bear the name of Forster at all. Had it been a devise to W. F. Charter, in which the initials only of the christian name were given, could there be any question raised as between him and Charles? I think not. Had the devisee been described as Charles Forster the case would have been very different. In argument, and in the decision of the learned judge in the court below, it has been observed that the testator calls his daughter Barbara Forster, whereas her name is only Barbara. I think this would not justify us in seeking by parol evidence to ascertain as between William Forster and Charles which of the two was meant by the description of "Forster Charter."

Will any other expression on the face of the will so justify us? I think not. Had the testator spoken of the devisee "continuing" to live with his mother at the farm, the case might have been different, but the language actually used is just as appropriate to the elder son as to the younger. Nothing could be more natural than for the testator to suppose that the devisee, whichever son took, would live on the property devised, and carry on the farm as *the testa- [376 tor himself had done; and then the testator provides in that case for the wife and daughter. It is true he does not provide for Charles, but on the other supposition he does not give anything to his eldest son and heir.

I confess I know of no authority which, where a will is plain and sensible on the literal construction of it, would authorize the court to transfer the property from a person named by a christian and surname which he bears, to another not bearing the christian name, merely because the full christian name of the devisee is not given. If the son called Forster only had not died long before, he would of course have had the better title, as fully and completely answering the designation; but I can see no ground for the transfer to Charles.

I think the learned judge miscarried in admitting evidence of declarations of intention by the testator. Such evidence can only be given to distinguish between two subjects or objects of a gift bearing the same description, the will being in itself clear, but the latent ambiguity being disclosed by evidence *dehors* the instrument. This evidence, if admitted, would not fail to influence the mind of the learned judge in his decision. Had it been right to analyze its effect, it would appear that none of the family doubted that the will, in words, designated the elder son, but they were surprised at the devise being inconsistent with parol declarations of the testator. It was upon that ground, as it seems to me, that the second son, Charles, was led to institute this suit.

Therefore, my Lords, I am of the same opinion as my noble and learned friend who has preceded me.

The LORD CHANCELLOR (Lord Cairns): My Lords, the consideration of this case has been attended, to me, with much anxiety, and that anxiety has not been diminished when I find that I have come to a conclusion upon it different from that at which some of your Lordships have arrived.

My Lords, upon one part of the case I have never entertained any doubt. I hold it to be clear, as I think all your Lordships do, that this is not a case in which any parol evidence of statements of the testator, as to whom he intended to benefit, or supposed he had benefited, by his will, can be 377] received. The learned judge of the Probate Court, Lord Penzance, appears to have admitted evidence of this description, although he states that his judgment would have been the same if the evidence had been excluded. I am of opinion that it ought to have been excluded. The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or to two things. That clearly cannot be said of the present case.

But, my Lords, there is a class of evidence which in this case, as in all cases of testamentary dispositions, is clearly receivable. The court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty, applied.

I may refer, as well-known authorities for these proposi-

tions, to the cases of *Doe v. Hiscocks* ⁽¹⁾, *Bernasconi v. Atkinson* ⁽²⁾, and *Drake v. Drake*, in this House ⁽³⁾.

Applying, then, this principle, what are the facts legitimately in evidence in this case? The testator, Forster Charter, was a Northumbrian yeoman, living, at the time he made his will, on his own freehold farm, with his wife and with a son, the respondent Charles Charter. The testator, besides his son Charles, had had two other sons, one, the elder, named William Forster, and another named only Forster, who had died when about nineteen years old, some years before the will was made. He had three daughters, two of them married—Mrs. Collinson and Mrs. Rountree—and an unmarried daughter, living with him, named Barbara.

The will of the testator is dated the 23d of June, 1859, and he died on the 8th of August, 1869.

With regard to the son William Forster, he lived with his father and mother till 1850, when he set up as a butcher at Cleator Moor, *in Cumberland, more than 100 miles [378 from the testator's house. He went to Australia in 1853, and in 1856 returned and resumed his trade of butcher at Cleator. From this time his visits to his father, if there were more than one, were at distant intervals. Prior to 1850 when he lived with his father, there appears to have been a certain amount of quarrelling between them, but there is no evidence that after 1850 any ill feeling continued to exist. It is in evidence, and not seriously contradicted, that the testator was in the habit of calling this son "William," or "Willie," and not "Forster."

As to the son Charles, he lived, as I have already said, with his father and mother, working with his father on the farm, and receiving no wages. My conclusion from the evidence is that he was living with his father and mother at the time that the will was made, for it appears to me that the statements of Mrs. Collinson, a witness for the appellant, and the cross-examination of the widow, fixing the day of the birth and age of an illegitimate child, born "shortly after Charles left home," make it clear that he did not leave home till after the will was made. His absence from home at that time was temporary, and owing, apparently, to circumstances connected with the illegitimate child to which I have referred; and after this absence he returned, and was living with the testator up to and at the time of his death.

I now turn to the will of the testator. It commences: "The last will and testament of Forster Charter . . . I nom-

(1) 5 M. & W., 363.

(2) 10 Hare, 345.

(3) 8 H. L. C., 172.

1874

Charter v. Charter.

inate and appoint my son Forster Charter as the executor of this my will, and to him I give, devise, and bequeath all my messuages, &c., for his use and benefit, and for the use and benefit of the persons hereinafter to be named." The name here given to the person whom he describes as his son is clearly inaccurate. His son Forster Charter was dead. The younger of his two surviving sons was Charles; the elder was William Forster; but Forster was not his first or leading name, nor was it the name by which he was generally or ever called or spoken of by the testator. There is, therefore, here clearly a mistake. It is possible that if nothing else was found in the will, yet, inasmuch as Forster formed a part of the name of the elder son, and no part of the name 379] of the *younger son, the elder son must have taken, there being no description nor demonstration to rectify or explain the mistake in the name.

But the testator continues: "My will is that my executor, Forster Charter, shall annually pay to Elizabeth Charter, my wife, the sum of ten pounds sterling, and at the same [time] allow my said wife her *ordinary* maintenance *so long as they reside together in the same house, but should they think proper to live separately*, then my will is that besides paying my wife the above-named annuity of ten pounds, the said Forster Charter shall allow my said wife, rent free, the use of the cottage at Woodburn Hill now occupied by Daniel Wood, and shall also supply her gratis with a reasonable quantity of bread, corn, potatoes, coals, butter, cheese, and garden produce. Also my will is that should any difference of opinion arise between my said executor and my said wife with regard to the quantity or quality of the above-named bread, corn, potatoes, &c., the matter shall be laid before Walter Davison, shoemaker, and his decision shall be final." These words appear to me to be very important. They do not give to the widow an annuity and maintenance "*if*," she and the son should reside together, or "provided" the son should live with his mother, or the mother with the son; but it is a direction to the executor to pay an annuity and allow maintenance "so long as they reside together in the same house," with farther directions should they "think proper to live separately." It appears to me that these words are intelligible and appropriate when applied to persons who were living together at the time, but that they are entirely inappropriate if applied to persons not so living together, and if intended to indicate a joint residence to commence for the first time at a future period.

Moreover, it was in the highest degree natural for the tes-

tator to contemplate the continuance of a conjoint residence which then existed, and had existed so long; but it was in a high degree improbable that he should assume that his eldest son would not merely leave the place where he was settled in life, but also take his mother to live with him. The words, "so long as they reside together," appear to me to be equivalent to the words "so long *as they continue [380 to reside together," and have, in this sense, involved in them the statement that the persons spoken of did reside together at the time. Further than this, the maintenance to be allowed the widow is termed "ordinary maintenance," which is put in marked contradistinction to the "reasonable quantity of bread, corn, potatoes, coals, butter, cheese and garden produce," which, if she were to live separately, and occupy the cottage, she was to receive, and any difference as to the amount of which was to be referred to the arbitration of Davison. I understand the terms "ordinary maintenance" to mean the usual or accustomed maintenance which she had hitherto had in the testator's house, which was to be judged of, not by the decision of Davison, but by the standard of what had been customary during the joint residence of the father and mother and the son Charles.

The result, therefore, is, that I find the testator speaking of a "son" as the object of his bounty. He has but two sons, and the name he gives is not the name of either. It is part of the name of one, but not his first name, or the name by which he is known and called. The testator is not accurate in the names of his children, for he calls his daughter, whose name was Barbara only, "Barbara Forster." To the inaccurate name of his son I find him adding a provision, which, although in terms a gift of an annuity and maintenance to his wife, is, in substance, a description or demonstration, as I read it, of the son who was to be executor and devisee.

The case, therefore, appears to me to become one of those in which there is an erroneous or inaccurate name, and a description or demonstration sufficiently clear to correct the error or inaccuracy. The name and the description cannot, as it appears to me, stand together. In *Drake v. Drake*(¹), where there was an accurate name, "Mary Frances Tyrwhitt Drake," but an inaccurate description, "niece," and which, therefore, was a much stronger case than the present, for there the name was wholly accurate, the Lord Chancellor, in moving the judgment of this House, expressed himself thus: "I see nothing that can warrant us in saying that the

(¹) 8 H. L. C., 172.

testator intended that his sister, Mary Frances Tyrwhitt 381] Drake, *should take the residuary estate under his will, unless the maxim which is contended for by the appellant should govern the case, that without any evidence whatever to prove error of demonstration, there is a rigid rule that the name should prevail. But, my Lords, I deny that there is any such rule. There is a maxim that the name shall prevail against an error of demonstration; but then you must first show that there is an error of demonstration, and until you have shown that, the rule *veritas nominis tollit errorem demonstrationis* does not apply. I think that there is no presumption in favor of the name more than of the demonstration. Upon referring to the numerous cases that have been cited at the bar, it will be found that there are more instances in which the demonstration prevailed than in which the name prevailed."

And there are some observations upon the same subject by the Vice-Chancellor, my noble and learned friend here present (Lord Hatherley), in *Bernasconi v. Atkinson* (⁽¹⁾), which, I think, are worthy of your Lordships' attention. The Vice-Chancellor says: "It certainly does appear, singularly enough, that the description of the legatee has, in most of the cases that have been referred to, prevailed over the name. Thus, in *Adams v. Jones* (⁽²⁾), the description of 'wife,' and in *Bradshaw v. Bradshaw* (⁽³⁾) the description of 'second son,' were held to designate the respective legatees. In *Doe v. Hulthwaite* (⁽⁴⁾), also, the name of the legatee was wrongly expressed, and the description of second son determined the title to the legacy. The selection of the second son showed that the attention of the testator was directed to that description of the object of his bounty, although the name was misplaced, the name of the third son being mentioned in priority to that of the second. So, again, in *Lord Camoys v. Blundell* (⁽⁵⁾), the gift was to a person not named, but described as the second son of Edward Weld of Lulworth, although there was no such person as Edward Weld, the possessor of Lulworth being Joseph Weld. There, the description of 'second son' prevailed, and was held to designate 382] clearly the second son of *Joseph. Lady Stourton was mentioned as one of the sisters of Edward Weld. She was a sister of Joseph, and the only person answering the description was the second son of Joseph. But, although this had happened in those cases, they do not say 'take the

(⁽¹⁾) 10 Hare, 345.

(⁽²⁾) 2 Y. & C., 72.

(⁽³⁾) 9 Hare, 685; 21 L. J. (Ch.), 352.

(⁽⁴⁾) 3 B. & Ald., 632.

(⁽⁵⁾) 1 H. L. C., 778.

description in preference to the name.' Far from it; the principle of the cases is, that where there are two descriptions, where the testator specifies in two different ways the object of his bounty, the court adopts that which, in each instance, appears to be the least open to error."

Applying the principle of these authorities, it appears to me that we have here a name in which there is obviously an error, and a description or demonstration which, as I read it, is clear and intelligible, and applies satisfactorily to the younger son, and does not apply to the elder, and therefore corrects the error of the name. My Lords, my noble and learned friend who addressed your Lordships last has said he knows of no authority which would authorize the court to transfer the property from a person named by a christian and surname which he bears, to another not bearing the christian name, merely because the full christian name of the devisee is not given. My Lords, I must submit to my noble and learned friend that this is the assumption of the whole question. The question is not one of transferring property from a devisee. The question is, who is the devisee? and that question must be answered by an examination of the whole will, and of all the circumstances of the case legitimately in evidence, an examination which becomes proper and even necessary as soon as it is found that the name inserted in the will is not the correct name of any person in existence.

My Lords, I think that the judgment of the court below ought to be affirmed. But I farther think that, as the case is one of great difficulty, and difficulty caused by the testator himself, your Lordships would do well to follow, with regard to the appeal, the course taken by the court below, and order the costs of both parties to be paid out of the estate.

LORD SELBORNE: My Lords, I have found great difficulty in satisfying my mind *on this case, especially [383 after I became aware of the view of it taken by my noble and learned friends who are for reversal, and I am not ashamed to own that my opinion upon it has fluctuated.

If the direct evidence of intention, which has been offered by the respondent independently of the light thrown by extrinsic facts upon the words of the will, could properly be regarded, there would be no difficulty; but I think we are compelled to hold, after *Doe v. Hiscocks* (*), *Bernasconi v. Atkinson* (*), and *Drake v. Drake* (*), that the court below was wrong in receiving that evidence. Why the law should

(*) 5 M. & W., 363.

(*) 10 Hare, 345.

(*) 8 H. L. C., 172.

1874

Charter v. Chatter.

be so, in cases where some error of description, involving a latent ambiguity, has to be corrected, when evidence of the same kind is admitted in what Lord Bacon describes as cases of "equivocation"⁽¹⁾, I am not sure that I clearly understand; but it has been so conclusively settled by a series of authorities to which we are bound to adhere.

My noble and learned friends opposite think that in this case the whole description of the devisee is contained in the words "my son Forster Charter;" and that there is nothing in the rest of the will which is not applicable to the appellant as properly as to the respondent. If they are right in this, I am not disposed to dispute the correctness of their conclusion that the description, as a whole, would be more properly applicable to the elder son, whose baptismal name is William Forster, than to the younger son, whose baptismal name is Charles.

In order to see whether this view is right, it has seemed to me, after much consideration, that no better test can be suggested than one which was put by noble and learned friend on the woolsack during the course of the argument. If the name, "Forster," had not occurred at all in the will, but if a blank had been left for the christian name of the legatee, wherever it occurs (the rest of the will being the same as it is now), would, or would not, the whole devise have been void for uncertainty? If it would, then the view, that there is nothing in the will except the name "Forster" more applicable to the one son than to the other, is *correct. But it is otherwise, if (in the absence of any christian name) there would be enough to show that the younger son was meant, and to prevent the devise in the will from being void for uncertainty. It would clearly not be necessary, in that case, that a demonstration, sufficient to show which son was meant, should be in the *form* of a *descriptio personæ*; any words, in any part of the will, which might enable the court to see with sufficient clearness that the testator meant one son, and not the other, must be enough for that purpose.

Applying this text, with the knowledge that the younger son, an unmarried man, had always down to the date of the will resided and been domesticated in the same house with the testator, and with his mother, the testator's wife (for such I consider to be the true result of the evidence), and that the elder son, a married man with issue then living, had not resided in the testator's house for nine years before the will was made, and then lived one hundred miles off; with the knowledge, also (which in *Bernasconi v. Atkinson*⁽²⁾), and

(1) *Maxims of the Law*, Rule xxiii.

(2) 10 Hare, 345.

other cases, was thought not immaterial), that the younger son was in constant communication with the testator, who was much attached to him, while his communications with the elder son were unfrequent, I should not have hesitated to say that the words, "so long as they reside together in the same house" (with the rest of the context in which those words are found), would have been enough to indicate the younger son, who resided in the same house with the testator and his wife at the date of the will, as the person intended, and to save the devise from being void for uncertainty. If such would have been the effect of these words, in the case supposed, then I cannot think that the view which regards them as equally and indifferently applicable to the elder and to the younger son, in the will as it stands, can be correct.

Still it does not follow that the scale may not be turned in favor of the appellant by the name "Forster"—and it is on that point that I have felt most hesitation. When a court has to choose between the name, which is only one part of an entire description, and other parts of the description more applicable to a person who *does not bear the name, [385 there is certainly no general rule that the name should have a preponderating weight; nor even that, *in re dubia*, it should always turn the scale, so as to save the devise from being void for uncertainty. Not to mention *Bradshaw v. Bradshaw* ⁽¹⁾, where evidence not properly admissible was received, in *Doe v. Hiscocks* ⁽²⁾ the gift was to the testator's "grandson, John Hiscocks, eldest son of his son, John Hiscocks." There was a grandson named John Hiscocks, who exactly fulfilled all parts of the description, except that he was not the *eldest* son of his father, although he was the eldest son of his father's second marriage. The eldest son (the lessor of the plaintiff in the case), was named Simon; and the Court of Exchequer, when directing a new trial on account of the improper reception of evidence, said that unless evidence of surrounding facts could be given, which would warrant a judge in directing a jury that the testator meant either the lessor of the plaintiff or the defendant, "the defendant will, indeed, for the present succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground that the devise is void for uncertainty." And this House, in *Drake v. Drake* ⁽³⁾, held the gift of a share of the testator's residuary estate to his "niece, Mary Frances Tyrrwhitt Drake," to be void for uncertainty; there being no *niece* who had the composite name "Mary Frances Tyrrwhitt;" (there were four nieces named "Mary Caroline Tyrr-

(1) 2 Y. & C., 72.

(2) 5 M. & W., 363.

(3) 8 H. L. C., 172.

1874

Charter v. Charter.

whitt," "Mary Elizabeth Tyrrwhitt," "Frances Isabella Tyrrwhitt," and "Frances Charlotte Tyrrwhitt"), though the appellant, the testator's sister-in-law, to whom (under the description of "my sister, Mary Frances Tyrrwhitt Drake,") another gift was made by the will, bore that exact name.

Admitting that in the present case the context, which I consider to point (*prima facie*, at all events) to the younger son, then domesticated with his parents, might not be strong enough to exclude the eldest son if he had been baptized "Forster," or had usually been so called by his parents, it appears to me that we have not really here "*veritatem nominis*." The true baptismal name of the elder son was not 386] "Forster," but "William Forster," *which, if he had usually been called Forster, would, of course, have been immaterial. But he was, in fact, never called "Forster," (not even "William Forster"), but always "Willie;" and there had been another son baptized and called by the name of "Forster" only, who had died sixteen years before, after attaining sufficient age to take an active part in the management of the testator's farm.

The conclusion which I draw judicially from these facts, is, that the testator would not, except through some clerical error, have used the words "my son Forster Charter," to describe either of the sons living at the date of the will; that these words strictly and properly describe the deceased son only, and (but for some error) would have been used in that sense only by the testator; and that if the testator had meant to describe his eldest son, he would (but for some error) have done so either under the name "William," by which alone that son was habitually called and known in the family, or under his full and proper baptismal name "William Forster;" just as, if he meant to describe the respondent, he would (but for some error) have called him "Charles."

The moment we find sufficient reason to conclude that there is really error in the name, the observation made in *Bernasconi v. Atkinson* (1), that "we are always bound to assume that the language of the will is the language of the testator," ceases to be material. It is, then (as was observed in the same judgment (2)), "part of the case, that a mistake has been made;" and it can make no difference whether the slip was the testator's own, or that of some one else whom he employed to draw up the will, and whose words he adopted.

This being my view, it follows that the use of an inaccurate name, which agrees only partially with the baptismal,

(1) 10 Hare, 348.

(2) Page 353.

and not at all with the familiar name of the elder son, ought not to prevent the youngest son from taking, when he, according to what I think sufficient and more trustworthy indications of intention discoverable in the rest of the will, would have taken, if no christian name at all had been mentioned.

I felt at one time a very strong inclination to yield to the authority *of my two noble and learned friends, who [387 think otherwise; but the result is, that I find myself unable to give my voice against that of my noble and learned friend on the woolsack, and in favor of a reversal of the judgment of the court below.

The following entry was afterwards made on the Journals: "The question was put,—whether the Orders and Decrees complained of in the said appeal be reversed? and it appearing that the votes were equal; thereupon, according to the ancient rule in the law (semper presumitur pro negante) it was determined in the negative," and the costs of both parties, as well in the court below, as in this House, were ordered to be paid out of the estate; and with these directions the cause was remitted to the Court of Probate.

Lords' Journals, 24th July, 1874.

Solicitors for the appellant: *Helder & Roberts.*

Solicitors for the respondents: *Flux & Leadbitter.*

See 1 Eng. Rep., 260, note; 6 Eng. Rep., 620, note.

Parol evidence is not admissible to supply an omission or cure a defect in a will, occasioned through oversight or mistake: *Fitz Patrick v. Fitz Patrick*, 36 Iowa, 674, 14 Am. Rep., 538, and see note to *Kurtz v. Hibner*, 8 Am. Rep., 669; see Wigram on Wills, Hawkins on Wills, O'Hara on Wills, titles "Parol Evidence," "Mistake."

Nor in any case to show the intention of the testator, except where there is a latent ambiguity arising *dehors* the will, as to the person or subject matter, or to rebut a resulting trust: *Fitz Patrick v. Fitz Patrick*, 36 Iowa, 674, 14 Am. Rep., 538, and see note to *Kurtz v. Hibner*, 8 Am. Rep., 669; see Wigram on Wills, O'Hara on Wills, Hawkins on Wills, titles "Parol Evidence," "Mistake."

Where a description of property or

person is in part false, but there remains sufficient to identify, the false portion will be rejected and the devise will take effect. *Aliter*, if a sufficient description does not remain after the rejection of the false description: *Fitz Patrick v. Fitz Patrick*, 36 Iowa, 674, 14 Am. Rep., 538, and see note to *Kurtz v. Hibner*, 8 Am. Rep., 669; see Wigram on Wills, O'Hara on Wills, Hawkins on Wills, titles "Parol Evidence," "Mistake."

Parol evidence is not admissible to show that by mistake, real estate was described as the west half of the north-east quarter, instead of the east half of the south-west quarter: *Fitz Patrick v. Fitz Patrick*, 36 Iowa, 674, 14 Am. Rep., 538, and see note to *Kurtz v. Hibner*, 8 Am. Rep., 669; see Wigram on Wills, O'Hara on Wills, Hawkins on Wills, titles "Parol Evidence," "Mistake."

[Law Reports, 7 House of Lords, 388.]

July 9, 10, 24, 1874.

388] *EDWARD WILLIAM O'MAHONEY, Appellant; and
ADELAIDE LOUISA BURDETT, Respondent. (¹)

*Will—"Die unmarried or without Children"—Executory Gift—Fourth Rule in
Edwards v. Edwards (²) considered and not approved of.*

A bequest to A., and if she shall die unmarried or without children, to B., is an absolute gift to A., defeasible by an executory gift over in the event of A. dying, at any time, unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary.

A gift to X. for life with remainder to A., and if A. dies unmarried or without children to B., is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying, at any time, unmarried or without children.

There is no rule of construction arising from possible delay in the vesting of a gift, which controls the natural meaning of the terms of the bequest.

There is no authority that the words introducing a gift over in the case of the "death unmarried or without children" of a previous taker, do not indicate, according to their natural meaning, death unmarried or without children at any time, or that the ordinary and literal meaning of the words used is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper.

Gift of £1,000 consols to A. for her life, after her death to her daughter B., "if B. should die unmarried or without children the consols I here will to revert to C." The will then appointed D. residuary legatee. Both A. and C. died in the lifetime of the testatrix. On her death B. entered into possession, and married, but after some years died without ever having had a child:

Held, that on the death of B. without children the gift over to the residuary legatee took effect, and that it was not affected by the death of C. in the lifetime of the testatrix. The gift to C. failed by lapse, and the residuary legatee became entitled to take all that C., if living at the death of the testatrix, could have taken.

The words "I here will to revert to C." indicated a benefit intended for C. by means of an executory limitation over, after enjoyment by a previous taker, and not an alternate gift to take effect, if at all, before the period of enjoyment had commenced.

The classification of rules set forth in *Edwards v. Edwards* (³) examined, and the fourth rule, as there stated, overruled.

Per LORD HATHERLEY: The fourth rule in *Edwards v. Edwards* would be better stated thus: "The period to which the executory devise will be referred will be the period of the death of the first taker, unless there are directions in the will inconsistent with that supposition."

Da Costa v. Keir (⁴), *Galland v. Leonard* (⁵), and *Home v. Pillans* (⁶), discussed and explained.

THIS was an appeal against the decision of the Lord Chancellor 389] cellor *Brady and the Lord Justice of Appeal Blackburn in Ireland, reversing a previous decision of the Master of the Rolls there (⁷).

Jane Brooke, in September, 1840, made her will, which contained the following clause: "I bequeath to my sister

(¹) Affirming 10 Irish Ch. R., N.S., 14.

(²) 1 Sw., 181.

(³) 15 Beav., 357; 21 L. J. (Ch.), 324.

(⁴) 2 My. & K., 15.

(⁵) 3 Russ., 360.

(⁶) 10 Ir. Ch. Rep. (N.S.), 14.

Grace L'Estrange, the widow of Colonel L'Estrange of Moystown, the sum of £1,000 in the 3½ per Cent. Irish Stock, for her life, and after her death to her daughter Grace L'Estrange. If my said niece should die unmarried or without children, the £1,000 I here will to revert to my nephew Colonel Henry L'Estrange of Moystown." The testatrix then appointed John Burdett her executor and residuary legatee. The present respondent is his widow and universal legatee.

Grace L'Estrange, the sister of the testatrix, and also Colonel Henry L'Estrange died in the lifetime of the testatrix. The testatrix herself died on the 29th of March, 1848.

Grace L'Estrange, the niece, in 1851, married Edward William O'Mahoney, the appellant, and the bequest of the £1,000 was, upon occasion of her marriage, brought into settlement to her for her life, for her sole and separate use, after her decease to her husband for his life, then to the issue of the marriage, and in default of issue to the survivor, husband or wife. Mrs. O'Mahoney died on the 14th of December, 1871, without there having been any child of the marriage, and her husband, the appellant, survived her.

In 1858 a cause petition was presented to the Court of Chancery in Ireland by Mr. O'Mahoney and his wife, praying, amongst other things, that their right to the said legacy should be established, and an order to that effect was afterwards made by the then Master of the Rolls. On appeal, Lord Chancellor Brady and Lord Justice of Appeal Blackburn concurred in reversing this order⁽¹⁾. Mr. Burdett, the executor and residuary legatee died in 1870, leaving the present respondent his widow and personal representative. On the death of Mrs. O'Mahoney, in December, 1871, the appellant revived the suit, by suggestion, as against Mrs. Burdett. The question raised was upon the construction of the above bequest; whether, in the events which had happened, the sum of £1,000 had, on the death of the tenant for life, become the absolute property of Grace O'Mahoney and her assigns, or was affected by her own subsequent *death [390 without children, so as to go over by force of the ultimate gift to Burdett under Jane Brooke's will. The decision of the Court of Appeal, pronounced in 1859, was, by special order of the court, signed and enrolled on the 4th of January, 1873, and this appeal was then brought.

Mr. Serjeant *Sherlock* (of the Irish bar) and Mr. *F. Everitt* for the appellant: This case was originally decided in the Rolls Court on the authority of the rule stated in *Edwards v. Edwards* ⁽¹⁾, where all the previous authorities were most

⁽¹⁾ 10 Ir. Ch. Rep. (N.S.), 14.

⁽²⁾ 15 Beav., 357; 21 L. J. (Ch.), 324.

1874

O'Mahoney v. Burdett.

carefully considered and their results classified. In the Court of Appeal that case, and the authorities on which it was founded, were disregarded. The rule, however, is clear that where there is a gift to a tenant for life, and a subsequent taker is introduced, and his death is treated as a contingency, that death is to be considered with reference only to the death of the tenant for life, and therefore the interest of the subsequent taker becomes absolute on his surviving the tenant for life. Here the title of Grace L'Estrange the niece became absolute on the death of her mother, the sister of the testatrix, named in the will as tenant for life of the fund. On her own death the title to it, as to property absolutely belonging to her, vested in her husband the appellant. Such was plainly the intention of the testatrix, and the only event on which the legacy to the niece was to be defeated was upon her dying before her mother, unmarried and without children. The testatrix never intended that after the death of the tenant for life the title to the legacy should remain in abeyance until the death of the niece, which might not happen for many years, for before then it would be impossible to say whether she might or might not have children: *Da Costa v. Keir* ⁽¹⁾; *Doe d. Bloomfield v. Eyre* ⁽²⁾; *Sugden on Powers* ⁽³⁾; *Cripps v. Wolcott* ⁽⁴⁾; *Jackson v. Noble* ⁽⁵⁾; *Douglas v. Chalmer* ⁽⁶⁾; *Re Allen's Estate* ⁽⁷⁾; *Dean* 391] **v. Handley* ⁽⁸⁾; *In re Hill's Trusts* ⁽⁹⁾; *Galland v. Leonard* ⁽¹⁰⁾; *Latter v. Edmonds* ⁽¹¹⁾; *Home v. Pillans* ⁽¹²⁾; *Slaney v. Slaney* ⁽¹³⁾. The courts will not adopt a construction of a will which would leave a gift like this so long in abeyance.

Mr. *George May*, Q.C. (of the Irish bar), and Mr. *Vaughan Hawkins* (Mr. *R. J. Robertson*, of the Irish bar, was with them), for the respondent:

The legacy here did not become absolutely and indefeasibly vested in Grace L'Estrange, the niece, on the death of the tenant for life. There was still a contingency on which it might be defeated, and that was her own death at any time, unmarried or without issue. She did marry, but she died without a child. In the event of her so dying without issue, the testatrix directed that the fund should go over to Colonel Henry L'Estrange. If he could not take it, the fund

⁽¹⁾ 3 Russ., 360.

⁽²⁾ 5 C. R., 718.

⁽³⁾ C. 5, s. 1, p. 167; c. 10, s. 1, pp. 513, 514.

⁽⁴⁾ 4 Madd., 11.

⁽⁵⁾ 2 Keen, 590.

⁽⁶⁾ 2 Ves. Jr., 501.

⁽⁷⁾ 8 Drew., 380; 25 L. J. (Ch.), 286.

⁽⁸⁾ 2 H. & M., 635.

⁽⁹⁾ Law Rep., 12 Eq., 302.

⁽¹⁰⁾ 1 Sw., 161.

⁽¹¹⁾ 3 Madd., 270.

⁽¹²⁾ 2 My. & K., 15.

⁽¹³⁾ 33 Beav., 631.

would fall into the residue. Whenever the event happened of Grace L'Estrange dying without issue, whether before or after the death of her mother, the tenant for life, the gift went over. It was not necessary to impugn the decision in *Edwards v. Edwards* ('). Under the circumstances of that particular case it might be assumed to be correct; but, assuming it to be so, it did not govern this case. In fact all the cases of this sort depended on the particular words of each will, and could with difficulty be ranged into a class of settled rules admitting of no change in their application. Where the will was intended to provide, not only for the death of a donee, but for the death of the donee without children, the intention would be but half fulfilled if the death of the tenant for life was taken as the limit at which the donee's title was to become absolute. On the death of the donee without children at any time, before or after the death of the tenant for life, the gift would be determined, and the fund would fall into the residue if there was no intervening donee to take it. In this case, therefore, it has done so, and it was not prevented doing so by the fact that Colonel Henry L'Estrange had died before the testatrix; in consequence of his death it went by *lapse to the residuary legatee. [392 *Wilkinson v. South* ('), *Smith v. Spencer* ('), *Bowers v. Bowers* ('), and *Cooper v. Cooper* ('), show that the death of the tenant for life was not the period at which the title to the fund would become absolute.

Mr. Serjeant *Sherlock*, in reply.

July 4, 1874. THE LORD CHANCELLOR (Lord Cairns): My Lords, Jane Brooke, by her will, dated the 18th of September, 1840, made a bequest of a sum of £1,000 in the following words: "I bequeath to my sister, Grace L'Estrange, the widow of Colonel L'Estrange, of Moystown, the sum of £1,000 in the 3½ per Cent. Irish Stock, for her life, and after her death to her daughter, Grace L'Estrange. If my said niece should die unmarried or without children, the £1,000 I here will to revert to my nephew, Colonel Henry L'Estrange, of Moystown;" and the testatrix appointed her nephew, John Burdett, her residuary legatee. Colonel Henry L'Estrange died before the testatrix, and so did Grace L'Estrange, the tenant for life of the legacy. The testatrix herself died on the 29th of March, 1848. Grace L'Estrange, the niece of the testatrix, was married in 1851 to the appellant O'Mahoney, and died in 1871, and there was no child of the marriage.

(1) 15 Beav., 357; 21 L. J. (Ch.), 324.

(4) Law Rep., 5 Ch. Ap., 244.

(2) 7 T. R., 555.

(5) 1 K. & J., 658.

(3) 6 De G. M. & G., 631.

1874

O'Mahoney v. Burdett.

The appellant, under these circumstances, contends that the interests of Grace L'Estrange, the niece, otherwise O'Mahoney, became, upon her surviving both her own mother and the testatrix, the tenant for life, absolute and indefeasible. He contends, in other words, that by the expression, "if my niece should die unmarried or without children," is to be understood the death of the niece unmarried or without children, not at any time whatsoever, but only during the lifetime of the tenant for life. Of this opinion was the then Master of the Rolls in Ireland, who made an order to that effect on the 15th of July, 1859. But this order was reversed by the judges in the Court of Appeal in Chancery in Ireland, who by an order dated the 17th of November, 1859, declared that the bequest of £1,000 stock 393] to Grace O'Mahoney was *defeasible in the event of her dying unmarried or without children, at any time. Under this order the respondent, as the representative of the residuary legatee, now claims to be entitled to the legacy.

In the absence of any authority to the contrary, I should entertain no doubt that the decision of the Court of Appeal in Chancery in Ireland was in accordance with the true interpretation of the will. A bequest to A., and if she shall die unmarried or without children to B., is, according to the ordinary and literal meaning of the words, an absolute gift to A., defeasible by an executory gift over, in the event of A. dying, at any time, under the circumstances indicated, namely, unmarried or without children. And in like manner a bequest to X. for life, with remainder to A., and if A. die unmarried or without children to B., is, according to the ordinary and literal meaning of the words, an executory gift over, defeating the absolute interest of A. in the event of A. dying, at any time, unmarried or without children.

In this particular will any light that is to be obtained from the context is not opposed to, but supports, the natural meaning of the words. The direction that if the niece should die unmarried or without children the £1,000 is "to revert to my nephew Colonel Henry L'Estrange," appears to indicate that the legacy was to come back, or come away, from the niece after she had had the possession and enjoyment of it, rather than to imply that the only state of circumstances under which Colonel Henry L'Estrange could take, would be a state of circumstances under which the niece would have had no enjoyment of the legacy at all. In other words, the benefit intended for the nephew appears to me to be introduced through the medium of an executory limitation over after enjoyment by a previous taker, and not

as an alternative gift to take effect, if at all, before the period of enjoyment commences.

But it is said that there is now established an absolute rule of law, or rule of construction, that where there is a gift for life, followed by a gift over of the capital, with a proviso that if the second taker shall die under age, or unmarried, or without children, there the death of the second taker, thus described, is to be taken to refer, not to death under those circumstances at any *time, but to death [394 under those circumstances before the tenant for life; and the case of *Edwards v. Edwards* (1), decided by the late Master of the Rolls, is referred to as the authority for this proposition.

It is clear that the case of *Edwards v. Edwards* (1), decided in the year 1852, could not establish any new rule of construction applicable to cases of this kind; and it is equally clear, looking at the report of the case, that the Master of the Rolls did not intend to establish any new rule of construction. His honor endeavors to collect and classify the various decisions which have taken place as to construction of gifts over in the case of death, or in the case of death under particular circumstances; and the question is, whether that part of his judgment which deals with gifts, like the one before your Lordships, is a just expression of the principles to be deduced from decisions before that time.

As regards the question actually decided in the case of *Edwards v. Edwards* (1), with reference to the will then before the court, there were expressions in that will which may well have warranted the conclusion at which the court arrived. The testator devised freeholds and leaseholds to his wife for life or widowhood. Then part of the property he gave to his eldest son "for him and his heirs to possess immediately after his mother's death or marriage." He made similar devises and bequests to another son and to a daughter; and he continued: "If my wife shall remain my widow my trustees shall assign and transfer to each of my children their shares, immediately after her death, and as soon as they arrive at twenty-one years of age: . . . Farther, if one of my children shall die leaving no children, his or her share shall be equally divided between the other two." The direction here for an assignment and transfer, coupled with immediate and absolute possession upon the death of the tenant for life, may

(1) 15 Beav., 357; 21 L. J. (Ch.), 324.

1874

O'Mahoney v. Burdett.

well have justified the decision confining the contingency, of death without children, to the life of the tenant for life.

The Master of the Rolls, however, in his judgment, divides the cases on this subject into four classes. Upon the first three classes it is not necessary to do more than to point out that the conclusions drawn from them by his honor do not 395] appear to me in any way to lead up to the rule which he deduces from the fourth class of cases which he mentions. The first class of cases is that where there is a gift to A., and if he shall die to B. If in such a case the words are to be read literally, you have, in the first place, the absolute gift, and then a gift over in the event of death; an event not contingent but certain, and in order to avoid the repugnancy of an absolute giving and an absolute taking away, the court is forced to read the words "in case of death" as meaning in case of death before the interest vests.

With regard to the second class of cases, namely, gifts to A. for life, and if he shall die without children, over, the Master of the Rolls expresses himself thus: "In the second of the supposed cases there is a manifest distinction. There the event spoken of on which the legacy is to go over is not a certain but a contingent event. It is not in case of the death of A., but in case of his death without children; and here it would be importing a meaning and adding words to the will, if it were to be construed to import as a condition which was to entitle B. to take, that the death of A. without children must happen before some particular period. In these cases, therefore, it has always been held, that if at any time, whether before or after the death of the testator, A. should die without leaving a child the gift over takes effect, and the legacy vests in B. This is established by the case of *Farthing v. Allen* (1), mentioned in Maddocks, but reported only in Jarman on Wills" (2). My Lords, I agree with these observations, but I must observe in passing that I am unable to understand how it is not, to use the expression of the Master of the Rolls, "importing a meaning and adding words to the will," if you construe it to imply, as a condition which is to entitle B. to take, that the death of A. without children must happen before some particular period, any more where there is not, than where there is, a previous life estate. I may pass over the third class of cases as not bearing upon the question now before your Lordships.

The fourth class of cases mentioned by the Master of the Rolls consists of those where a life estate is given, and the property is then given to A. with a direction that if he shall

(1) 2 Madd., 310.

(2) Vol. ii., p. 688.

die leaving no child (or unmarried or under twenty-one), over. As to these *cases the Master of the Rolls ob- [396 serves, that the words referring to death without leaving a child, &c., may be applied to death at any time whenever it may occur; "nor," he continues, "if it were *res integra* would it be easy, in the absence of any indication of intention to be collected from the rest of the will, to determine what construction ought to prevail." The Master of the Rolls, however, proceeds to say that he considers it "settled, both by principle and authority, that, in the absence of any words indicating a contrary intention, the rule is, that the words indicating death without leaving a child," must be construed to refer to the occurring of that event before the period of distribution, which he takes as synonymous with the death of the tenant for life.

The principle to which the Master of the Rolls refers, he states to be, the desire of the court to avoid a construction so inconvenient as one which must suspend the absolute vesting of the gift during the whole lifetime of the legatee, a principle which, he says, influenced Lord Brougham in his decision of the case of *Home v. Pillans* (*). With regard to the case of *Home v. Pillans*, it will be found, when I examine it, to have no application whatever to bequests of the kind which we are now considering, and I am not aware of any principle such as the Master of the Rolls refers to, being applied to control the natural meaning of the terms of a bequest. In the second class of cases referred to by the Master of the Rolls, the gift continues defeasible during the whole life of the legatee; and in cases like that before your Lordships it would, even according to the construction of the appellant, continue defeasible during the whole of the life of the legatee, supposing the legatee to be outlived by the tenant for life.

The Master of the Rolls, however, refers to decided authorities. These authorities are *Da Costa v. Keir* (*), *Gal-land v. Leonard* (*), and *Home v. Pillans* (*). In *Da Costa v. Keir* (*) the testator gave the residue of his estate to his widow for her life, and after her decease to a person whom I shall denote as C., to and for her own use and benefit, to be at her own disposal, but if C. should happen to die, leaving any children living at her decease, then to such children; but if C. should happen to die without any child or children living at her decease, then to D. and E. equally; but if *either should die before they became entitled to re- [397 ceive the residue of his estate, then the whole to the survi-

(*) 2 My. & K., 15.

(*) 3 Russ., 360.

(*) 1 Sw., 161.

1874

O'Mahoney v. Burdett.

vor; but if both should happen to die in the lifetime of the widow, then to his widow absolutely. There were, in this will, various circumstances pointing out the death of the widow as the period at which all the interests were to become indefeasible. In the first place the principal of the residue was given to C. "from and after the death of the widow, to and for her own use and benefit, to be at her own disposal;" a provision which appeared to negative any continuing defeasibility. In the next place, the gift over from C. was framed, either in case she should die leaving children, or in case she should die not leaving children. And inasmuch as she must of necessity die either leaving children or not leaving children, the case was the same as those where the gift over is in the event of death *simpliciter*. Farther, the ultimate gift was, in case D. and E. should both happen to die in the lifetime of the widow, a provision which seemed to imply that the previous gifts over were meant to be in case of death in the lifetime of the widow. It was upon these particular expressions, peculiar to this particular will, and not upon any general rule of construction, that the Master of the Rolls arrived at a decision, which, as it appears to me, was in that case entirely justified by the words of the will.

With regard to the case of *Galland v. Leonard* (*) it is unnecessary to delay your Lordships by going through a narrative of the will. It is singular that there also, as in *Da Costa v. Keir* (*), there was a gift over in the double event of either leaving or not leaving children, and there was a provision that the children of a daughter should be entitled to the same share as their mother would have been entitled to "if then living," and it was upon these expressions, and on the general construction of the particular will, that the Master of the Rolls held that the daughters surviving the tenant for life took indefeasible interests.

The case of *Home v. Pillans* (†) was a case of an entirely different kind. There was there a bequest to the testator's nieces when and if they should attain twenty-one; and, in case of the death of either niece leaving children, or a child, the testator gave the share of the niece so dying to her children or child. This was not the case of an absolute gift, with a gift over in a certain event. There was no gift over, and there was no gift at all until a niece attained twenty-one, and the child of a niece marrying and dying before twenty-one would have been wholly unprovided for if the court had not held that the words "in case of the death of

(*) 1 Sw., 161.

(†) 3 Russ., 360.

(‡) 2 My. & K., 15.

my said nieces or either of them, leaving children or a child," pointed to a death under twenty-one.

I am unable, therefore, to find in the authorities referred to by the Master of the Rolls the general rule of construction which he deduced from them.

I may add that there is a well-known class of cases referred to by Mr. Fearne in his book on Contingent Remainders⁽¹⁾, and by other writers, where, with respect to executory devises of terms for years or other personal estates the Court of Chancery has been accustomed to lay hold of any words in the will to tie up the generality of the expression "dying without issue," and confine it to dying without issue living at the time of the person's decease. In several of these cases there has been a prior life estate, as in the case of *Atkinson v. Hutchinson*⁽²⁾, but in none of them was it ever suggested that the words, "dying without issue" or without leaving issue, could be construed as pointing to a death before the tenant for life.

My Lords, I need not refer in detail to cases decided since the case of *Edwards v. Edwards*⁽³⁾, some of them have professed simply to follow *Edwards v. Edwards*⁽⁴⁾, and among them is the case of *In re Heathcote's Trust*⁽⁵⁾ now under appeal before, and about to be decided by, your Lordships. Another is the case of *Smith v. Spencer*⁽⁶⁾, before Lord Cranworth, a case in which, if it is analogous to the present, the decision of *Edwards v. Edwards*⁽⁷⁾ was certainly not followed.

I am unable to find, in any case prior to *Edwards v. Edwards*⁽⁸⁾, any authority that the words introducing a gift over in case of the death unmarried or without children of a previous taker do not indicate, according to their natural and proper meaning, death unmarried or without children occurring at any time, or that this *ordinary and lit- [399 eral meaning is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper.

I ought to observe, lest it should appear to have been overlooked, that at one period of the argument doubts were expressed whether under the present will the nephew, Colonel L'Estrange, having died in the life of the testatrix, the gift over from Grace L'Estrange could take effect. This point was not raised in the court below, and I am satisfied that the gift to Colonel L'Estrange having failed by lapse,

(1) 9th ed., p. 471.

(2) 3 P. Wms., 258.

(3) 15 Beav., 357; 21 L.J. (Ch.), 324.

(4) Law Rep., 9 Ch. Ap., 45; see the case *Ingram v. Soutten*, post.

(5) 6 De G. M. & G., 631.

1874

O'Mahoney v. Burdett.

the residuary legatee is entitled to take all that Colonel L'Estrange, if living at the death of the testatrix, could have taken.

On the whole, I am of opinion that the present appeal should be dismissed with costs. My Lords, I say with costs, more particularly, because I observe that out of this legacy, not a large one at the best, the costs of litigation which came on two occasions before the court below have already been paid; and if farther costs were to be paid out of the legacy, it would in effect be making the owner of the legacy pay the costs of both sides throughout the litigation.

LORD HATHERLEY: My Lords, I concur in the opinion expressed by my noble and learned friend. The case has been extremely well argued, and we have had the great advantage of a full argument in a subsequent case in which the circumstances are in a great degree similar to those in this case; and which therefore required the pointing out of the various authorities bearing upon a limitation framed as the limitation is in this will.

My Lords, the case of *Edwards v. Edwards* (¹) has in point of fact been the substantial ground for the appellant's argument in the case now before your Lordships. That case was recognized by the Master of the Rolls in Ireland (²), before whom the present case was originally argued, and, whether or not he intended to indicate that he decided this case in favor of the appellants solely in reliance on that authority, or for what other reason he so decided it, does not 400] fully appear; but I think there is a somewhat *peculiar reference in the judgment of the Master of the Rolls in Ireland to that particular case as an authority which he thought proper to follow. The Court of Appeal in Chancery in Ireland came to a different conclusion from the Master of the Rolls, and hence the appeal to this House.

My Lords, the question arose in the case of *Edwards v. Edwards* (¹) upon a will which was very carefully drawn, and I say that advisedly, because I have read it through with care, although it is not necessary to go into it now in detail. There was, in that case, every ground for supporting the judgment independently of any general rule being deduced from the authorities which had been cited before the Master of the Rolls, and upon which he seems to have relied. With reference to the rule which has been conceived to have been established in that case, what, in point of fact, the Master of the Rolls was doing was this: in a case of some difficulty before him the various authorities had been

(¹) 15 Beav., 357; 21 L. J. (Ch.), 324.

(²) 10 Ir. Ch. Rep. (N.S.), 14.

cited (most of which have been cited on the present occasion), in which there was a gift apparently absolute first of all, and then a subsequent executory devise cutting down the first gift upon the occurrence of a subsequent event. The mode of expressing that was the subject of his consideration in the case of *Edwards v. Edwards* (1), as it is of ours in the case now before us.

The Master of the Rolls, therefore, reviewed all the authorities, and he said that those authorities appeared to him capable of being ranged under four different heads, the first being that in which there is a gift in apparently absolute terms to A., but in case of his death a gift over, with no intermediate interest created in the will. A very early instance of that occurred in the case of *Atkinson v. Hutchinson* (2), in the middle of the last century. But in that case an expression importing contingency, but applied to a certain event like that of death, had to be applied to something different from that to which it might have had a more literal application. The words could not be considered to apply, as they would seem literally to apply, to death as a contingency, because that must be an absolute certainty; and, therefore, the contingency must be sought in something else which had occurred to the testator as a reason for so framing his gift. *Therefore the only mode of construing it [401 was to understand the testator as saying, "This contingency referred to the case of A.'s death during my (the testator's) lifetime, in which case the legacy would remain undisposed of, and I therefore provide that in that event it shall go over to another." Then comes a subsequent case, a gift to A., apparently absolutely, and on his death without leaving any children, then over. Here the courts have at all times held, and the Master of the Rolls so states in *Edwards v. Edwards* (1), that that affords a sufficient indication that the words "in case of his death without leaving issue," or "without leaving children," as the case might be, were to extend to the whole period of the first taker's interest. Although he would apparently, by the terms of the gift itself, and did indeed in point of law, take absolutely, yet there was an executory devise over, that might take effect at his death when the contingency should be ascertained whether he died childless or not.

My Lords, I pause here to say that I entirely concur in the remark which was made by the noble and learned Lord on the woolsack with reference to the earlier decisions in cases of that character, namely, where there is a gift to A.

(1) 15 Beav., 357; 21 L. J. (Ch.), 324.

(2) 8 P. Wms., 258.

positively, and in the event of his death without issue, to B. Before the last Wills Act such a gift as that was held to confer an interest which could not be defeated during A.'s life. A gift over on failure of issue would have been a gift sinning against the rule with reference to perpetuities, if it had to be construed as meaning an indefinite failure of issue, and consequently the gift would have become abortive. The courts, then, as my noble and learned friend has stated, were astute to find upon the face of the will something which could induce them to say: This does not mean an indefinite failure of issue, but issue failing at the time of the death of the person who was the first taker; and that being the case, it falls within the proper limitation, of course, as to time. I say they were astute in doing that, as everybody will well know who recollects the singular distinction that was established between gifts of personalty, in which the words "dying without leaving issue" occurred, as contrasted with similar devises of realty. The same terms in the case of realty were 402] held to create an estate tail, *that is to say, death without leaving issue imported an indefinite failure of issue; whereas in personal estate the words "without leaving issue" meant at the time of the death. So far was that carried, that in one well-known case, these same words occurring in one and the same will, had two different meanings given to them, in the one case applying to real, and in the other to personal estate⁽¹⁾. Now it is very remarkable that if this supposed rule in *Edwards v. Edwards* ⁽²⁾ had been thought of as a rule, many cases might have been saved by the construction that death without issue, after a previous life estate, could be held to mean without issue in the lifetime of the tenant for life, because then the perpetuities would be saved, and the gift over would have a construction which is perfectly legitimate, and which would have its full and complete effect. But no such cases will be found in any of the earlier decisions upon the subject.

The third case put forward by the Master of the Rolls was one in which there was a previous life estate. The second case that he took was one in which there was no previous life estate, and then a gift over without issue, and he said that it had always been held that that gift over without issue was to be determined on the death of the original first taker to whom an absolute interest had been given, and whose absolute interest would be cut down by that executory devise if he should be found to have left no children.

⁽¹⁾ *Quare, Hutchinson v. Stephens*, 1 ⁽²⁾ 15 Beav., 357; 21 L. J. (Ch.), 324. Keen, 240.

He says that that was the right and proper construction to adopt. If so, it seems to me that there is no reason for distinguishing the fourth rule from the second, namely, that the proper time for ascertaining whether the death without issue is to have the effect of passing over the property, should be taken to be the period of the death itself, at which time, and which alone, it can be accurately ascertained whether the person so dying will have left issue or not.

- But what appears to have led the Master of the Rolls to enunciate that rule was this: In the case of personal estate there has, no doubt, been a great desire on the part of the courts to favor an early vesting, and more particularly in the case of a gift over without children, where there is no gift to the children themselves, *and where, therefore, [403 the only mode of the children taking is through the medium of their parents taking. And in cases where the contingency was in the event of there being children born, it has been held that the vesting has given the parent an immediate interest defeasible in the event of there not being children living at his decease, but as those children who had been born during his lifetime would have been left a long time unprovided for, the court has laid hold of that circumstance, among others, for the purpose of favoring the early determination of the contingency which was to divest the estate.

So again, I apprehend, in another class of cases, many of which were cited before us, which have been decided since *Edwards v. Edwards* (¹), one of them having been before myself; in those cases where the court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the courts have laid hold of that circumstance to say, "We hold this defeasance to be before that period of distribution arrives," holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who, having it in their hands will of course spend it without any farther trust, and on the other hand that a subsequent event, namely a certain person's dying childless after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back again,

(¹) 15 Beav., 357; 21 L. J. (Ch.), 324.

1874

O'Mahoney v. Burdett.

and recall that money which he has paid in order to hand it over to those who would take under the executory devise. The courts have held that that was unreasonable. In the case I alluded to it was a trade, which was directed to be carried on by the executors until the son attained a certain age, when the trade (and not the trade only, but other property as well) was to be handed over to him, and then there was what appeared to be a divesting executory devise in the event of his dying without issue. I held in that case, and I 404] should *be disposed to hold the same again if a similar case came before me, that the time was evidently pointed out when the final and complete distribution was to be made, and that the executory devise must be held to be referred to that time, because it was impossible to call the property back again and hold that the executory devise was then to take effect after there had been that full and complete distribution of the funds.

Now, my Lords, I have read all the cases since the argument in this case, and certainly in far the larger proportion of the cases which have been cited, that decision in *Edwards v. Edwards* ⁽¹⁾ has been referred to as settling and well establishing the rule; but there has always been, I think, on the part of every judge, a saving of the other circumstances which might appear on the will, the court having always carefully to consider the whole will, and, having regard to all the various clauses contained in it, to see what is the full and complete and perfect intention of the testator. I apprehend, my Lords, that the rule referred to by the Master of the Rolls may be more correctly stated in somewhat the reverse way to that in which it was stated by him in the case of *Edwards v. Edwards*, namely, that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the will which are inconsistent with that supposition. The Master of the Rolls has rather put it in the other way, that an executory devise is to take effect upon a person dying without children during the period of the first antecedent estate unless there are circumstances to be found in the will to the contrary. I apprehend that the reverse mode of putting it will be the more correct mode of expressing the true state of the case.

In the particular case here before me I find nothing to favor a contrary construction to that of extending the period of the contingent character of the estate to the whole period of the life of the original legatee. It is simply a case of a

(1) 13 Beav., 357; 21 L. J. (Ch.), 324.

legacy, first to the wife of Colonel L'Estrange, and then to her daughter Grace, and then if Grace dies without children to revert (that is the expression) to Colonel Henry L'Estrange, her brother. I would not lay much stress upon the word "revert;" but so far as any stress can *be laid [405 upon it, it certainly does rather favor the contrary construction to that which I hold to be the primary construction. But, feeling as I do, that you ought to find something in the will which limits the contingency to less than the whole life of the first taker before you can so limit it, I find nothing of the kind, and therefore I agree with my noble and learned friend on the woolsack that the appeal should be dismissed. And I agree with him also in thinking that considering all that has been done in regard to the costs which this fund, already sufficiently small, has borne, it should be dismissed with costs.

LORD SELBORNE: My Lords, I am of the same opinion with my noble and learned friends.

The Master of the Rolls, in *Edwards v. Edwards* ⁽¹⁾, had before him a case in which a distribution by assignment or transfer was expressly directed to be made after the death of the tenant for life; thereby *prima facie* terminating a trust which down to that time was to continue. His Lordship, in classifying, and deducing rules from, the previous authorities to which he referred, did not advert expressly to the distinction between such a case and one like that now before us, in which a mere succession of interests is provided for, without any such express words of payment, assignment, or distribution, indicating the termination of a trust. But the terms in which he states the rule derived by him from the two cases of the fourth class to which he refers—*Da Costa v. Keir* ⁽²⁾ and *Galland v. Leonard* ⁽³⁾—are these, that "words, indicating death, without leaving a child, as the event on the occurrence of which the gift over is to take effect, must be construed to refer to the occurring of that event before the period of distribution." In one of the two cases from which he so deduced this supposed rule (*Galland v. Leonard* ⁽³⁾), there was an actual distribution and winding-up of the trust expressly directed by the testator. In the other (*Da Costa v. Keir* ⁽²⁾) there was evidence of an intention that the legatee should in some event take an absolute *interest; which intention must have been wholly [406 defeated if the divesting clauses could not be referred to a period earlier than the death of the legatee. And the gene-

⁽¹⁾ 15 Beav., 367; 21 L. J. (Ch.), 324.

⁽²⁾ 3 Russ., 360.

⁽³⁾ 1 Sw., 161.

1874

O'Mahoney v. Burdett.

ral result of his Lordship's examination of the authorities is thus stated at the end of that judgment ('): "If I am right in the view which I take of the principle of these cases, the effect is, as it appears to me, that the rule of the court is that the contingency, or the event which the testator speaks of as a contingency, is always referrible to the period of payment or distribution, except in the single case where there is a simple gift to A., and, if he shall die without leaving issue, to B., in which case it cannot be referred to any period of distribution."

It is manifest that when a testator (as in *Galland v. Leonard* (")) has directed payment or distribution to be made at a certain time, so that a trust, intended by him to continue until that time, shall then come to an end, and has proceeded to substitute other devisees or legatees through the medium of the same trustees and the same trust, in case of the death, without leaving issue, of any of the persons to whom such payment or distribution was first directed to be made; there is strong *prima facie* reason for holding that the contingency must be intended to happen, if at all, before the period of distribution. And a rule so limited (subject of course to exceptions resulting from any particular words indicative of a contrary intention) would seem to be in harmony with sound principle and with the general current of authority.

A like conclusion may also *prima facie* be arrived at when the language of a will shows (as in *Da Costa v. Keir* (")) that the legatee was intended, in some event, to take an absolute interest, and when that intention cannot in any event receive effect unless the operation of such a divesting clause is limited to a time earlier than the legatee's death. Almost, if not absolutely, all the cases in which the fourth rule laid down in *Edwards v. Edwards* (') is found to have been applied, or referred to with approval, before the decisions now under appeal, will be seen, upon examination, to come within one or the other of these two categories.

I cannot, therefore, think that either the authorities prior [407] to **Edwards v. Edwards* ('), or that case itself, or any by which it has been followed, are sufficient to establish a general rule for the construction of all wills, when neither the reasons applicable to the two classes of cases which I have mentioned, nor any other reasons founded on the language of the particular will, may justify its application. It seems to me that it would be arbitrary, and in fact a *petitio principii*, to apply the phrase "period of distribution"

(') 15 Beav., 366.

(') 1 Sw., 161.

(3) 3 Russ., 360.

(4) 15 Beav., 357; 21 L. J. (Ch.), 324.

(itself an equivocal term, which may mean either an apportionment of interests by the will, or a direction to trustees to divide and hand over a fund) to a case in which there is merely a particular estate (such as a life interest) followed by a limitation over to A. B., his heirs or executors, liable to be divested if, for example, A. B. dies without leaving issue living at the time of his death. The testatrix has not said that the fund is to be distributed, nor that the trust is to come to an end, upon the termination of the particular estate; nor can I perceive on what ground that which she has not said ought to be implied. The words of contingency are clear and sensible as they stand, and nothing needs to be added or implied for the purpose of giving them full effect. The reasons assigned by Lord Romilly for his second rule in *Edwards v. Edwards* (¹), seem to me to be not less applicable to such a case than to the particular class of cases which that second rule supposes; and I think it is the true result of the authorities, before *Edwards v. Edwards* (¹), that in such a case, words limiting, by an unnecessary implication, the duration of the contingency on which the divesting clause depends, ought not to be added to the will.

This disposes of the appeal now before us, unless it can be held that the gift to Grace L'Estrange, the niece, being absolute in form, never became subject to the divesting clause, because the contingent gift by the clause was to a person who died in the testatrix's lifetime. When the appeal was first opened, I doubted whether, under these circumstances, the effect of the divesting clause was not wholly evacuated, in the same way as if there had been a blank in the will for the name of the substituted legatee. But the result of the preliminary argument on that point, and of the authority cited by the respondent, has been to satisfy me that *the lapse of a contingent gift, by way of substitution, to a person named who might have survived the testatrix, operates (when the contingency has happened on which the gift to the person was made to depend) for the benefit of the residuary legatee, or next of kin, in the same way as if the gift had been originally made to the same person, free from any contingency.

Order appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 24th July, 1874.

Solicitor for the appellant: *Thomas Johnstone.*

Solicitor for the respondents: *H. Shoubridge.*

(¹) 15 Beav., 387; 21 L. J. (Ch.), 324.

[See the next case and note at conclusion.]

1874

Ingram v. Soutten.

[Law Reports, 7 House of Lords, 408.]

July 16, 24, 1874.

W. H. INGRAM and J. RAINIER McQUEEN, Appellants; and
BENJAMIN SOUTTEN, Respondent.⁽¹⁾

Will—"Dying without leaving issue living at the time of her decease."

A will contained bequests to daughters, failing whom and their issue living at their deaths, to sons, failing whom and their issue living at their deaths, to "Mary H. her executors, &c., and in case Mary H. shall depart this life without leaving any issue of her body living at the time of her decease" over:

Held, that the natural meaning of these words was, the dying of Mary H. without issue living at the time of her death, at whatever time that death might happen; on that event happening the fund went over.

And that there was no technical rule of construction which prevented the words from being applied according to this their natural meaning.

The rule of construction, known as the fourth rule, stated in *Edwards v. Edwards* (²), overruled.

[See the preceding case.]

THIS was an appeal against an order of the Lords Justices which had reversed a previous order of Vice-Chancellor Malins (³). The question arose on the will of Robert Heathcote, dated the 10th of *January, 1811, which, after bequests and devises, not now necessary to be mentioned, directed his trustees to stand possessed of various stocks and funds on trust to pay the dividends, &c., unto his wife for her life or widowhood. And as to the residue, after her decease or second marriage to pay one moiety unto his daughter, Mary Ann Heathcote for her separate use during her life, and the other moiety to his daughter, Maria Heathcote, for her separate use during her life. And after the decease of each of his daughters, for the benefit of her children. If either daughter should have no child, her moiety to go to the other daughter and her children; and then came the proviso on which the question turned:

"Provided that if neither of my daughters Mary Ann and Maria shall have any child who being a son shall attain twenty-one, or being a daughter shall attain that age or be previously married, then the trust moneys, &c., shall be upon trust for William Samuel Heathcote and George Deare Heathcote equally, &c. But, in case either of my sons shall depart this life without leaving issue of his body, lawfully begotten, *living at the time of his decease*, then the whole of the said trust moneys, &c., shall thenceforth devolve and

(1) Reversing *In re Heathcote's Trusts*,
8 Eng. Rep., 716.

² 15 Beav., 357; 21 L. J. (Ch.), 324.

³ Law Rep., 9 Ch. App., 45, *nom.* *In re Heathcote's Trusts*, 8 Eng. Rep., 716.

be upon trust for the other of my said sons, his executors, &c. But in case both of my said sons shall depart this life *without leaving issue* of their respective bodies, lawfully begotten, *living at their respective deaths*, then the said trust moneys, &c., shall be upon trust for Mary Heathcote, spinster (being the natural daughter of my said son, William Samuel Heathcote, and now residing with me), her executors, &c.; but, in case the said Mary Heathcote shall depart this life *without leaving any issue of her body*, lawfully begotten, *living at the time of her decease*, then the said trust moneys, &c., shall be upon trust for such one or more of the daughters of my brothers-in-law, Philip Deare and George Russell Deare, respectively, now living, or hereafter to be born, as shall be living at the time *when the trusts hereinbefore declared shall determine*, their executors, &c. And if there shall be no such daughter of either of them, the said Philip Deare and George Russell Deare, *at that time living*, then the said trust moneys, &c., shall be upon trust for Charles Deare, his executors, &c., forever."

*The testator died in 1818, leaving his wife, his two [410] daughters, his two sons, and Mary Heathcote him surviving. The wife died in 1823, Maria Heathcote died unmarried, Mary Ann Heathcote survived and married Mr. Angelo, but died in 1866, without issue. The two sons had died before them, without lawful issue. Mary Heathcote, named in the will, who had, in April, 1859, married Benjamin Soutten, the present respondent, then succeeded to the property. She never had any issue, and she died on the 8th of April, 1872. There was at that time no daughter of George Russell Deare, but there was then living Elizabeth, a daughter of Philip Deare, who had married Admiral John Spratt Rainier. This lady died on the 9th of April, 1872, just one day after Mrs. Soutten. The appellants were Mrs. Rainier's executors.

On the 8th of March, 1873, the appellants presented a petition in Chancery, submitting that, in the events which had happened, the death of Mrs. Soutten was the time when the trusts declared by the will determined, and that they as executors of Mrs. Rainier were entitled to the fund. The petition came on for hearing before Vice-Chancellor Malins, who, on the 25th of July, 1873, made an order in accordance with its prayer.

A petition for rehearing, by way of appeal, was presented by Mr. Soutten, and the cause came on to be heard before the Lords Justices, who reversed the Vice-Chancel-

1874

Ingram v. Soutten.

lor's order, being of opinion that the fourth rule declared in *Edwards v. Edwards* ⁽¹⁾ was applicable in the case.

This appeal was then brought.

Mr. *John Pearson*, Q.C., and Mr. *A. P. Whately*, for the appellants: There may be cases in which the rules supposed to be declared in *Edwards v. Edwards* ⁽¹⁾ are applicable, but this case is not one of them. It is unnecessary, therefore, to go the full length of contending that that case cannot be supported. But at the same time it is difficult to find authority for it in principle or in precedent. The older authorities certainly do not justify it. No such doctrine was [411] laid down in *Atkinson v. Hutchinson* ⁽²⁾, nor in **Wilkinson South* ⁽³⁾, or can fairly be deduced from those cases, or from *Crook v. De Vandes* ⁽⁴⁾. In the last-named case the word used was "heirs," and the failure of heirs was left in the most indefinite form as to the period at which the failure was to be ascertained, but it was there said that if the expression had been "if he leaves no such heirs," the limitation would have been good, as being confined to the time of the death, and as not implying an indefinite failure of heirs. In that distinction (these words really fixing the period), which was not sufficiently attended to in *Edwards v. Edwards* ⁽¹⁾, lies the explanation for the apparent difference among the decisions on this subject. *Everest v. Gell* ⁽⁵⁾ is an instance of the same kind. The supposed rule is not warranted even by the cases on which it presumes to be founded: by *Da Costa v. Kier* ⁽⁶⁾, for there the death of testator's widow was the period contemplated for the absolute vesting of the legacy; nor by *Home v. Pillans* ⁽⁷⁾, for there the time of the vesting was plainly fixed by the testator to be the arriving at twenty-one; nor did *Galland v. Leonard* ⁽⁸⁾ lay down any such rule, for there the express direction was to pay and divide between the daughters the trust moneys upon the death of the widow, and the daughters' children were made to stand in the place of their mothers, and the moneys were to be paid to them as if to their mothers—when? why, of course, upon the death of the widow; and, of course, on the death of the widow the interest of the daughters absolutely vested. *Dean v. Handley* ⁽⁹⁾ cannot be said to support *Edwards v. Edwards* ⁽¹⁾; it followed without expressly affirming that case, and merely decided that where the rule there stated is applicable to the whole

⁽¹⁾ 15 Beav., 357; 21 L. J. (Ch.), (324).

⁽²⁾ 3 P. Wms., 258.

⁽³⁾ 7 T. R., 555. See *Doe d. Sheers v. Jeffery*, *Ibid.*, 589.

⁽⁴⁾ 9 Ves., 197.

⁽⁵⁾ 1 Ves. Jun., 286.

⁽⁶⁾ 3 Russ., 360.

⁽⁷⁾ 2 My. & K., 15.

⁽⁸⁾ 1 Sw., 161.

⁽⁹⁾ 2 H. & M., 635.

of an income, it is applicable also where a part only is disposed of. In *Davenport v. Bishopp* (1) the gift to the children of A. and B. was limited to those who were living at the deaths of A. and B. The learned judge who decided *Edwards v. Edwards* (2) could not have attributed to it the meaning now *sought to be affixed to it; for though in *Slaney v. Slaney* (3), where he appeared to follow it, he added that "it did not lay down that a testator might not direct otherwise." In the subsequent case of *Milner v. Milner* (4), he did not follow *Edwards v. Edwards* (2), because of the peculiar words of the will, and he repeated the observation that all general rules were subject to have their operation excluded by the use of exact words expressing the intention of a testator. In *Smith v. Spencer* (5) Lord Cranworth did not follow the rule in *Edwards v. Edwards* (2), nor can *Ware v. Watson* (6) be said to do so; for, as Lord Hatherley observed in *Bowers v. Bowers* (7), Lord Justice Turner's decision in that case had been founded on the peculiarities of the will then before the court; and *Bowers v. Bowers* (7) followed a different rule. The true construction here, and the only one that will not defeat the plain intention of the testator, is, that in the events that happened the trusts did not determine until the death of Mary Heathcote (Mrs. Soutten), without children living at her death, and that on that event happening, the fund went over to Mrs. Rainier, in whom it became absolutely vested: *Farthing v. Allen* (8), *Salisbury v. Petty* (9), *Gosling v. Townshend* (10), and *In re Hill's Trusts* (11), were also cited.

Mr. Cotten, Q.C., and Mr. Hubert Lewis, for the respondent: The decision of the court below is in accordance with principle, and has followed a rule of law always if possible adopted by the courts to prevent the undue postponement of the vesting of property. In no way whatever does the application of that rule defeat the intention of the testator. The gift to Mary Heathcote here is absolute, and there are no words of subsequent defeasance of her estate. The words really used apply only to her death during the life of the preceding possessor, the tenant for life. Under such circumstances the rule in *Edwards v. Edwards* (2) was properly adopted. That rule was not for the first time laid *down in that case, and its object was to prevent the [413

(1) 2 Y. & C. Ch., 451; 12 L. J. (Ch.), 492.

(2) 15 Beav., 357; 21 L. J. (Ch.), 324.

(3) 33 Beav., 631.

(4) 34 Beav., 276.

(5) 6 De G., M. & G., 631.

(6) 7 De G., M. & G., 248.

(7) Law Rep., 5 Ch. App., 244, 249.

(8) 2 Madd., 310.

(9) 3 Hare, 86.

(10) 17 Beav., 245.

(11) Law Rep., 12 Eq., 302.

1874

Ingram v. Soutten.

unnecessary postponement of vesting. Nothing but the clearly expressed intention of the testator ought to produce a different result. There not only was no such clearly expressed intention here, but as far as the words went they pointed to an absolute vesting of the property the moment the bequest to Mary Heathcote came into operation, and that was on the death of the tenant for life. This was personal property, and the gift was to her executors, administrators, and assigns. This was equivalent to a direction to pay, and wherever such a direction has been expressed the gift has been treated as absolute. *Edwards v. Edwards* (') was founded on the rules adopted in *Home v. Pillans* ('). It was considered, and not in the least degree impugned, in *Randfield v. Randfield* ('), where Lord Kingsdown distinctly expressed his approval of it ('). *Home v. Pillans* (') itself was cited there and commented on, and no one appeared even to doubt the rule that where there is an absolute gift it cannot be cut down by a subsequent proviso, unless the proviso is perfectly clear in itself, and is necessary to be acted on in order to make the whole provisions of the will consistent with each other. In *Dean v. Handley* (') the rule in *Edwards v. Edwards* (') was deliberately adopted, and applied to a case where a life estate was given in a portion of the whole income, but the whole, together with accumulations, was given (subject to a death without issue) upon the determination of that estate. So again in *In re Hill's Trusts* ('), the rule in *Edwards v. Edwards* (') was, after full consideration, recognized and adopted, the Vice-Chancellor describing it as "a very sound rule," and no appeal has ever been brought against that decision. Though the judgment of the court in *Bowers v. Bowers* (') appears to be unfavorable to *Edwards v. Edwards* ('), an examination of the case shows that the judge proceeded entirely on the words of the particular will, for Lord Justice Giffard there said ('), "I quite agree with what has been laid down by the 414] Master of the Rolls in **Edwards v. Edwards* (')." In *Milner v. Milner* (') the rule itself was again considered by the Master of the Rolls, and adhered to as a rule, but the decision there proceeded on the particular words of the deed, and therefore, though the word "absolutely" was used with reference to the gift to Thomas, the whole context of the deed was taken to show that Thomas did not become

(') 15 Beav., 357; 21 L. J. (Ch), 324.

(2) 2 My. & K., 15.

(3) 8 H. L. C., 225.

(4) 8 H. L. C., 240.

(5) 2 H. & M., 635.

* (6) Law Rep., 12 Eq., 302.

(7) Law Rep., 5 Ch. App., 244.

(8) Law Rep., 5 Ch. App., 251.

(9) 31 Beav., 276.

absolutely entitled on the death of the settlor. In *Gosling v. Townshend* (1) and *Slaney v. Slaney* (2) the Master of the Rolls deliberately adhered to the rule he had laid down in *Edwards v. Edwards* (3), and any cases which appear not to follow that rule, can be fully accounted for by differences in the words of a particular will.

The great inconvenience of postponing the vesting of a legacy has always been recognized, and therefore it has been a rule of the courts that where there are two terms to which the court could refer for the vesting of a gift, the earlier period will be taken for that purpose. *Home v. Pillans* (4) proceeded on that principle, and has always since been approved. *Cooper v. Cooper* (5) did not impeach that principle, for there the gift to the testator's children was by the words of the will itself clearly intended only to be a life estate. The observations of Lord Hatherley in *Bowers v. Bowers* (6), as to Lord Justice Turner's judgment in *Ware v. Watson* (7), explained exactly the grounds of his Lordship's decision, namely, that he does not there adopt the rule as to absolute vesting of the property, because he thinks the peculiar words of the will there do not permit that rule to be applied. But he throws no doubt upon the principle that where there is an absolute gift it can only be afterwards cut down by a clear and unquestionable expression of an intention to that effect. There was such an expression in that case, there is none such here. *Smith v. Spencer* (8) does not appear to have been cited in either of these cases, though it has been relied on here; but it is not to be treated as an authority here. The discussion and the judgment do not appear to have been influenced by any consideration of more than the mere words of the will itself. There are no words [415. here which show the testator's intention to give a defeasible interest to Mary Heathcote, but there are words which do lead to the conclusion that he intended the gift of the fund to her should be absolute.

Mr. *Whateley* replied.

THE LORD CHANCELLOR (Lord Cairns): My Lords, in this case, Robert Heathcote, the testator, by his will, dated in 1811, gave his residuary estate to his wife for her life, and after her death or second marriage to pay the income of one-half to his daughter Mary, and the other half to his daughter Maria during their lives, and after the death of each to

(1) 34 Beav., 276.

(2) 17 Beav., 245.

(3) 15 Beav., 357; 21 L. J. (Ch.), 324.

(4) 2 My. & K., 15.

(5) 1 K. & J., 658.

(6) Law Rep., 5 Ch. App., 249.

(7) 7 De G., M. & G., 248.

(8) 6 De G., M. & G., 631.

1874

Ingram v. Soutten.

hold her moiety on trust for her children; if no child or children, her moiety for the other daughter and her children; and if neither daughter should have a child attaining a vested interest, then to his sons as tenants in common; but in case either of his sons should die without leaving issue lawfully begotten living at the time of his death, then the whole thenceforth to devolve and be upon trust for the other son. But in case both sons should die without leaving issue living at their respective deaths, then upon trust for Mary Heathcote, spinster (a granddaughter of the testator), absolutely; but in case she should die without leaving issue living at the time of her death, then on trust for such one or more of the daughters of Philip Deare and George Russell Deare as should be living at the time when the trusts therebefore declared should end, equally to be divided between them.

The two daughters and the son survived the wife, and died without issue, and the question now arises between the respondent, who represents Mary Soutten, formerly Mary Heathcote, who died without issue on the 8th of April, 1872, and the appellants, who represent the daughter of Philip Deare, who died on the 9th of April, 1872, one day after Mary Soutten. The Vice-Chancellor Malins decided in favor of the appellants, but this decision was reversed by the Lords Justices by the decree now under appeal.

So far as the words of this will are concerned, I have found nothing whatever in it qualifying the natural meaning of the words "in case Mary Heathcote shall depart this life without leaving any issue of her body lawfully begotten living at the time *of her decease," and the various other similar expressions in the will. These words appear to me clearly to express a dying without issue living at the death, at whatever time that death may take place; and framed, as this will evidently is, by a professional hand, and in technical language, I am not aware of any words that could have been used more clearly pointing to death at any time. On the other hand, the construction adopted by the Lords Justices requires us to read in (as the Lord Justice James admits) the words "before the period of distribution" whenever the word "death" occurs. The Lord Justice James proceeds upon the authority of the case of *Edwards v. Edwards* (¹), and he states that the rules laid down in that case are simple, intelligible, and very beneficial in the administration of testator's estates. The Lord Justice appears to treat these rules as absolute rules of con-

(¹) 15 Beav., 357; 21 L. J. (Ch.), 324.

struction, to be applied unless there is something repugnant to them in the particular will; and he adds ('): "I carefully abstain from referring to any expression in the will which seems to support this view, lest it should be argued hereafter that our decision went on the particular words of the will. I go on this ground, that the rule applies unless there are words in the will to prevent its application, and that in this will there are not any words to take the case out of the general rule."

My Lords, in the case from Ireland of *O'Mahoney v. Burdett* (*), just now disposed of by your Lordships, I have stated at length the reasons why, if what is termed the fourth rule in *Edwards v. Edwards* (°), was meant to be laid down as a rule of construction, without regard to expressions in the particular will requiring such a construction, I am unable to accede to a rule the effect of which would be to alter the natural meaning of words, and I do not repeat the observations upon the authorities which I then laid before your Lordships. I can find nothing whatever in the context, or in the general scope of the provisions, of this will which leads me to think that the words pointing to the death of Mary Soutten without issue living at the time of her death, are to be construed as pointing to her death otherwise than as at whatever time it may occur.

*I therefore submit to your Lordships that the order [417 of the Lords Justices of the 20th of November, 1873, ought to be reversed and the case remitted to the Court of Chancery, with a declaration that the gift over under the will of the testator upon the death of Mary Soutten, formerly Mary Heathcote, without leaving issue of her body, lawfully begotten, living at the time of her decease, took effect.

But this is not to disturb any order made by the Court of Chancery for payment of costs or charges and expenses out of the fund. I mention this last point, because, subject to any correction which may be made by the learned counsel, it appears to me, looking at the orders, that there has been some arrangement made in the Court of Chancery for the payment of the costs generally out of the fund; and if so, I should not propose that your Lordships, in reversing the decree of the Lords Justices, should interfere with what has been done there with regard to costs.

LORD HATHERLEY: My Lords, I take exactly the same view of this case as that which has been taken by my noble

(1) 2 Law Rep., 9 Ch. Ap., 51.

(°) 15 Beav., 357; 21 L. J. (Ch.), 324.

(*) *Ante*, p. 388.

1874

Ingram v. Soutten.

and learned friend on the woolsack, and I do so for the reasons which I have given in the former case.

I look in vain in this will for any indication which should vary what seems to me to be the proper construction of the words, "dying without children," or, as it is expressed here, "in case of their departing this life without leaving issue of their respective bodies lawfully begotten living at their respective deaths." That is the character of the limitation that runs through the various heads under which the devolution of this testator's property is to take place. So far from finding any direction for the immediate payment, and handing over by the trustees of the fund which is in their hands, and thereby acquitting themselves of their trust at once by parting with the property to those to whom it is given, I find a carefully-framed series of limitations, studiously drawn throughout the whole series in such a manner as to exhaust any possible contingency which may happen before there is any final distribution of the property. When 418] such a contingency happens, *as the death of either of the testator's sons without leaving issue lawfully begotten living at the time of his death, then it is directed that the whole of the money shall thenceforth be upon trust for the other son, and so on, passing from one limitation to another. Then when you come down to Mary Heathcote, near the final termination of the limitations, you have this direction, "In case the said Mary Heathcote shall depart this life without leaving any issue of her body lawfully begotten living at the time of her decease, then the said trust moneys," and so on, "shall be upon trust for such one or more of the daughters of my brother-in-law, Philip Deare, Esquire, and the said George Russell Deare, respectively, now living or hereafter to be born, as shall be living at the time when the trusts hereinbefore declared shall determine, to be equally divided between or amongst such daughters." The testator contemplates, therefore, this state of things, that the whole of the previous series of trusts for persons to take absolutely, whose interests are to be divested by their deaths without leaving children, shall have been gone through before the property devolves on the daughters of the Deares; and then comes this direction, "And if there shall be no such daughters of either of them the said Philip Deare and George Russell Deare at that time living, then the said trust moneys," and so on, "shall be upon trust for the said Charles Deare, his heirs, executors, administrators, and assigns forever." There and there alone the trusts terminate.

There is no particular period whatever at which you can

say that the funds are absolutely to be handed over unless you arrive at the event on the occurrence of which of course the trust will naturally terminate. If any one of those persons whose interest is absolute dies leaving children living at his decease, that, of course, will put an end to the trust, but until the moment arrives when that event happens the trust is not finished, the fund remains in the hands of the trustees, and there is no direction that it shall be divided. Therefore each taker must hold liable to the divesting which the testator said was to take place in the event happening which he pointed out.

LORD O'HAGAN : My Lords, I am of the same opinion. I abstain from taking *part in the consideration of the [419 case of *O'Mahoney v. Burdett* (')], because in one of its stages it had come before me in the Court of Chancery Appeal in Ireland, but, having given considerable attention to the arguments urged before your Lordships in that case, I quite adopt the conclusion at which you have arrived. That conclusion manifestly governs the present case; and the reasons which sustain it,—which after the elaborate statement we have heard I do not think of repeating,—are applicable here and ought, *a fortiori*, to prevail upon the facts before us.

In *O'Mahoney v. Burdett* (') the intention of the testator was tolerably clear; but here it is made far clearer by a succession of limitations carefully and accurately drawn, with the fullest deliberation, by persons acquainted with his real purpose, and competent to interpret it in proper language. Avoiding any idle repetition of the reasons already given, I wish to express my full concurrence in the view that there is really no such unyielding rule of construction as has been relied upon to coerce the judgment of the House. The decision of the Lords Justices now under appeal, did not proceed upon the language of the will or the intentions of the testator. It was assumed in that decision that the case of *Edwards v. Edwards* (") established an absolute rule, which the court was bound to obey. I have looked carefully into that case, and into the cases upon which it was founded; and I agree with my noble and learned friend that they furnish no real ground for any such assumption. They do not compel us to ignore the terms of the will and defeat the objects of the testator. In all of them the learned judges will be found to have regard to the particular words employed and to the general intention exhibited in the whole of the will. It does not appear to me to be desirable that we should

(') *Ante*, p. 388.

(") 15 Beav., 357; 21 L. J. (Ch.), 324.

1874

Ingram v. Soutten.

multiply, without necessity, the rigid rules which sometimes compel us to give to words an interpretation which their authors would have repudiated. Although there are cases in which such rules have been established for such a length of time, and upon such high authority, that they cannot safely be relaxed or abandoned, I do not think that their masterful operation should be extended, when we are asked to effectuate a testamentary disposition, reasonably clear in 420] its object and its terms, which they *would antagonize in part or nullify altogether; and in the present case it does not seem to me that we are precluded from giving to language its natural interpretation.

Looking carefully to the circumstances founding the decision in *Edwards v. Edwards* (¹), I do not think that it can be taken to rule the case before us. The *ratio decidendi* there does not, in my judgment, govern it at all. There, the necessity of distributing the fund at a particular period is repeatedly relied on as necessitating the decision; but such a ground has no application to this case or to that of *O'Mahoney v. Burdett* (²).

In a subsequent case before the same learned judge (*Gosling v. Townshend* (³)), he puts the matter himself in this way: "Where a period of distribution is fixed, and the testator speaks of a death previous to that time, the death thus spoken of as a contingency must refer to that period of distribution. But if a testator gives a legacy to A., but if A. die without leaving issue, then to B., to what period can that be referred except to the whole period of A.'s life?" In like manner, it will be found that in several subsequent cases the Master of the Rolls put upon his decision in *Edwards v. Edwards* (¹) construction which does not warrant the use of it as an authority on the point we are now required to decide. And this being so, and the intention of the testator as to the period he meant to fix being plain, and stated deliberately, and with care and caution, we are bound to act on that intention, construing the words which declare it according to their ordinary sense.

Therefore, my Lords, I concur in the opinion that the judgment of the court below should be reversed.

LORD SELBORNE: My Lords, the language of the Lord Justice James when he says, "I carefully abstain from referring to any expression in the will which seems to support this view, lest it should be argued hereafter that our decision went on the particular words of the will," produced upon my mind certainly the impression that we should hear from

(¹) 15 Beav., 357; 21 L. J. (Ch.), 324. (²) *Ante*, p. 388. (³) 17 Beav., 245.

the learned counsel for the respondents some passages pointed out in the will which might have justified an *express [421 inference of intention in accordance with the alleged rule. But, my Lords, I think we heard no such passages pointed out to the House, and I really am at a loss to know what parts of the will can have appeared to the learned Lord Justice to be capable of being referred to as supporting the application of the rule, and I feel some regret that, for the reason that he gave, he did not think fit to refer to them.

Reading the will myself, I entirely agree with what has fallen from one of your Lordships opposite (Lord O'Hagan), that so far as there is indication of a particular intention bearing one way or the other on the face of this will, it is wholly against the judgment which has been given in the court below. Certainly there is a very marked absence of anything like an indication of an earlier period for the termination of the trust, than that which would be consistent with the longest duration of the time within which the contingency might take place, by which the divesting was to be produced. And I am disposed, my Lords, to go even a little farther, and to say that there is a clause in the will, the influence of which extends throughout the material portion of it, and which really according to the natural and literal meaning of the words justifies the observation that the testator did expressly contemplate that the divesting might take place after all the preceding interests had come to an end, and after the sons had been put into possession of the property. Because, my Lords, the first of the series of the alternative divesting clauses, or successive divesting clauses, whichever they ought to be considered, is in these terms: "But in case either of my said sons shall depart this life without leaving issue of his body lawfully begotten living at the time of his decease, then the whole of the said trust moneys and premises shall thenceforth devolve and be upon trust for the other of my said sons, his executors, administrators, and assigns." I do not say, my Lords, that there would be a necessary implication in those words that if the event had happened before the funds became vested in possession in the sons, it would go over to the survivor. But this I think I am entitled to say, that the state of things expressly contemplated by those words is one in which the previous trusts for the tenant for life, and the issue of the tenant for life, have come to an end, and in which the only trust to be considered is one in *possession in favor [422 of the sons, so that upon the death of one of the sons, *eo instanti* the whole of the trust moneys may at once devolve

1875

Morgan v. Larivière.

to, and be upon trust for, the other, which event could only happen after the time which the Lords Justices have here treated as the period of distribution.

My Lords, I entirely concur in the judgment which has been moved.

Mr. Pearson: Perhaps your Lordships will allow me to say with reference to the question of costs, that the inference which one of your Lordships drew is perfectly accurate, namely, that the payment of the costs out of the fund in the court below was done with the consent of both parties; and accordingly your Lordships will observe that the appeal is expressly limited so as not to apply to so much of the order as relates to the question of costs.

Ordered that the order of the Lords Justices of the 20th of November, 1873, be reversed. And it is declared that the gift over under the will of the testator, Robert Heathcote, upon the death of Mary Soutten (formerly Mary Heathcote) without leaving issue of her body living at the time of her death, took effect. And that the cause be remitted, &c.

Lords' Journals, 24th July, 1875.

Solicitors for the appellant: *Birch, Ingram, Harrison & Co.*

Solicitor for the respondent: *Welbury James Milton.*

See note to *Ferris v. Gibson*, 4 Ed- cited see *Brownell v. Brownell*, 10 Rhode wards' Chy., 710, marg. p., Banks's ed. Island Rep., 509; *Hill v. Hill*, 74 Penn. 1871. In addition to the cases there St. Rep., 173.

[Law Reports, 7 House of Lords, 423.]

Feb. 8, 11, 1875.

423] *JUNIOUS SPENCER MORGAN and CHARLES CUBITT GOOCH, Appellants; and PIERRE ALFRED LARIVIÈRE, Respondent.¹

Opening a Credit—Contract—Equitable Assignment or Appropriation of a Fund—Trust—Foreign Sovereign—Chancery.

If a trust fund is in the Court of Chancery, that court may proceed to administer it, even although a foreign sovereign may be interested in it, and may not think fit to come before the court in a suit relating to it.

A writing opening a credit for a particular sum cannot, of itself, constitute an equitable assignment or specific appropriation of that sum so as to create a trust. It is a

(¹) Reversing 3 Eng. Rep., 499.

mere statement that the person writing it will act as paymaster to the person to whom it is written, up to a certain amount, on his performing the conditions set forth in it.

L. entered into a contract (dated the 30th of November, 1870) with the French Minister of War, represented by J., his delegate at London, to supply 20,000,000 of ball-cartridges of a certain quality, the whole to be supplied by the 10th of January, 1871. Time was to be considered of the essence of the contract. L. desired some arrangements to be made as to payment. M. & Co., who acted in London as financial agents for the French Government, wrote to L. a letter dated the 1st of December, 1870, in these terms: "We are instructed by J. to advise you that a special credit for the sum of £40,000 has been opened with us in your favor, and that it will be paid to you ratably as the goods are delivered, upon receipt of certificate of reception issued by the French Ambassador or by J." The goods were not delivered according to the contract:

Held, that this letter did not constitute Messrs. M. & Co. trustees for L. as to the sum named, nor constitute an equitable assignment as of a fund in their hands, and that consequently this was not a matter for the exercise of the jurisdiction of the Court of Chancery.

THIS was an appeal against a decision of Lord Chancellor Hatherley, by which a previous decision of Vice-Chancellor Malins had been affirmed with a variation. The facts of the case are set forth in detail in the report of the hearing in the court below⁽¹⁾. The following is a summary of them:

In 1870 the Committee for the National Defence in France authorized the making of a contract for ball-cartridges for the French army. This contract, dated on the 30th of November, *1870, was for the supply of 20,000,000 of [424 ball-cartridges, and was entered into with Larivière and his then partner Bellot des Minières. These gentlemen were described in the contract as residing in London. The French "Minister of War, represented by M. Joulin, his delegate in London," on the 10th of November, 1870, entered into the contract here. The contract contained several articles, of which the following are alone material now to be considered: 4th. "Out of the 20,000,000 cartridges to be supplied, 7,000,000 must be delivered before the 5th of December, and the remainder before the 10th of January, 1871; and time will be considered of the essence of the contract." 5th. "The cartridges will be tried in London by a French delegate charged with this office [duty], who will deliver a certificate stating that the cartridges are sufficient for war service, and serviceable for the rifles of the model of 1866." 7th. "The lots will, immediately after having been duly accepted, on the responsibility of the delegate of the Minister of War in London, be paid for through the care of the French Ambassador, who will issue checks for the amount." 8th. "The contractors cannot claim acceptance of any of the merchandize after the 10th of January, 1871, and cannot claim

(1) *Nom. Larivière v. Morgan*, Law Rep., 7 Ch. App., 550; 3 Eng. Rep., 499.

1875

Morgan v. Larivière.

any indemnity for goods supplied after the hereinbefore stipulated time."

The contractors had asked for the deposit of a sum of money with some London bankers. No actual deposit of money appeared to have been made, but Messrs. Morgan & Gooch, who acted as financial agents for the French Government, under the direction of M. Joulin, wrote, on the "1st of December, 1870," the following letter to Larivière & Des Minières: "Gentlemen, we are instructed by M. Joulin to advise you that a special credit of £40,000, equivalent to one million of francs, has been opened with us in your favor, and that it will be paid to you ratably, as the goods are delivered, upon receipt of certificates of reception [acceptance], issued by the French Ambassador or by M. Joulin. We shall require receipts in duplicate for the payment or payments as made, and the surrender of this letter on the final payment under it being made."

The whole interest in the contract subsequently vested in Larivière. He supplied, and the French Government accepted *and by check on Morgan & Gooch paid for, 70,000 ball-cartridges. Alterations in the form and manufacture of the cartridges were afterwards proposed, and experiments were tried, some of them under the supervision of M. Joulin, which experiments Larivière alleged in his bill prevented him from complying with the stipulation in the articles as to the delivery of the cartridges within the time therein fixed. On the 13th of January, 1871, Morgan & Gooch wrote to Larivière to say: "M. Joulin now informs us that as the time has already expired within which the deliveries of goods were to be made, and to pay for which this credit was opened, no farther deliveries can be made under it, and we are not to make any farther payment in virtue of it. Under these circumstances, in accordance with the instructions, we request you will return us our letter dated the 1st ultimo, and take note that the credit advised therein is withdrawn and cancelled." Some cases of cartridges had been furnished after the 10th of January, but certificates of acceptance of them had been refused.

Larivière filed his bill against Morgan & Gooch and the nine persons who, in November, 1870, had formed the Committee for the National Defence, but the bill was afterwards amended by striking out these latter individuals and making the Government of the French Republic a defendant. Morgan & Gooch put in an answer, but the Government of the French Republic declined in any way to appear in the cause.

The bill prayed that Morgan & Gooch might be declared to hold the residue of the £40,000 upon trust for the plaintiff, and for inquiries, and for an injunction to restrain them from parting with this residue of the £40,000. The defendants denied that they had done more than merely open a credit for sums to be paid as the French Government might order. They opened such credits from time to time under orders, and carried back to the general account any balance from any particular credit so opened.

The cause was heard before Vice-Chancellor Malins, who (after having given the French Government the opportunity to appear in the suit, an opportunity of which it did not avail itself) made an order that the defendants Morgan & Gooch should bring into court the residue of the sum of £40,000, and a declaration that the condition as to time being of the essence of the contract *had been waived, and [426 therefore he directed an inquiry as to what, if anything, was due to the plaintiff on the footing of the agreement. On appeal to Lord Chancellor Hatherley, it was declared that by virtue of the contract of November, 1870, and the letter of the 1st of December, 1870, the plaintiff became entitled to be paid ratably for all cartridges supplied to and received by the French Government under the contract out of the sum of £40,000; and that the first limit of time fixed by the contract, the 5th of December, 1870, by which 7,000,000 of cartridges were to be delivered, was waived. And inquiries were directed whether the second limit of time had been waived; what number of cartridges had been delivered, or tendered and accepted, and what rejected; and the balance of the £40,000 paid into court was ordered to be retained.

This was an appeal against that order.

Mr. *J. Pearson*, Q.C., and Mr. *Fry*, Q.C. (Mr. *Jason Smith* was with them), for the appellants: There was not a pretence, either in the facts of the case, or in the rules of equity, which ought to govern it, for the filing of this bill. The letter relied on by the plaintiff did not constitute a trust, yet it had been presented to the court as a trust, and the fund spoken of in that letter was described in the court below as "impressed with a trust." That was the foundation of the error of which the appellants had to complain. The letter was in no way whatever a trust, it was a mere announcement that certain persons had opened a credit at the house of the appellants in favor of the respondent. But in what way was it to be in his favor? not in an absolute form, not in the way of a right vested in despite of all contingencies, but in the form of a title for him to demand certain

1875

Morgan v. Larivière.

moneys upon and after his performance of certain conditions. He could not demand the whole sum at once, he could only ask for such portions of it as would from time to time satisfy the value of the goods which, from time to time, he had delivered. And the delivery of goods was not the only restrictive condition on his right to claim the money; the goods must not only be delivered by him, and delivered within a fixed time, but were to be accepted and received, 427] the fitness of the goods having *been ascertained and then certified, and the acceptance of them after this certification was to be acknowledged. When all these things had been done, then, and then only, the appellants undertook to pay the respondent sums of money sufficient to meet the value of the goods which had been offered for acceptance, certified as being fit for acceptance, and declared to have been actually accepted. There was a farther condition, the goods were to be delivered within certain specified periods, and the time of delivery was declared in the articles of the contract to be of the essence of the contract. No one of these conditions had been complied with by the respondent. And part only of the goods had been delivered, that part had been accepted and had been paid for. No claim could be made by him in respect of any other goods against the appellants.

There was no equitable assignment of a specific fund here. The appellants had not received any fund specially appropriated to the use of the respondent; no such fund existed in their hands, in respect of which they had put themselves in the position of trustees to the respondent bound to pay out the fund to him as to a person who had a vested right in it. There was nothing like an equitable assignment of it: *Citizens Bank of Louisiana v. First National Bank of New Orleans* (1); and the respondents were, therefore, not liable to account to him for it. They had no fund in hand; they had never pretended to have a fund in hand; they had merely consented to make payments from time to time upon the performance, by the proposed payee, of certain conditions. If he did not perform the conditions he had no right to claim the payments. If the appellants had, under such circumstances, made payments, they would have done so in their own wrong. The claim really was one for liquidated damages on a contract, and the proceeding taken here was wholly misconceived.

Again, the form of the decree was wrong, for it affected to be a decree which was in substance to affect the property of

(1) Law Rep., 6 H. L., 352.

a foreign sovereign state which had in no way submitted to the jurisdiction of the court. The appellants were not that sovereign state, and no decree against them could make them responsible for it. *Upon the question of jurisdiction, [428 *Stebenson v. Anderson* (1), and *Duke of Brunswick v. King of Hanover* (2), were referred to.

Mr. Glasse, Q.C., and Mr. Davey, for the respondent: The letter of the 1st of December, 1870, written by the appellants to the respondent, must be taken as an appropriation of a specific sum of money. The money must have been in the hands of the appellants, who were the financial agents of the French Government; but whether that was the fact or not was really immaterial. They had stated the amount which they bound themselves to pay. This letter was written after the respondent had agreed to supply the goods, and was in fact a declaration that the appellants had the money to meet his demands for his goods, and that it would be paid to him on that account. It is called a special credit, but what is a special credit except a declaration that there is in the hands of these persons a certain sum of money devoted to a particular purpose. So far as the respondent could comply with that purpose, he has complied with it; and the only failure was as to time, and that was the consequence of the acts of the agents of the French Government. [References were made to the evidence to support this statement.] So that even if the money was only to be paid upon the performance of certain conditions, the non-performance of them could not affect the respondent, for their performance had been prevented by the acts of the French Government, or of the accredited agents of that Government, and the title of the respondent to receive payment was unaffected. If time was of the essence of the contract the French Government had completely waived the stipulation. The appellants could not shelter themselves from the duty they had undertaken by referring to the delay which the French agents had themselves occasioned. The declaration that they had opened a credit in favor of the respondent was a declaration that they had control over a fund of a certain specified amount appropriated to a certain specified purpose. Surely that is the declaration of a trust as to that specified fund, and shows that the fund itself was impressed with a trust. The appellants could not afterwards deny *what [429 they had thus written, and free themselves from liability on the supposed delay in the performance by the respondent of what he had undertaken. If such a matter was set up as an

(1) 2 V. & B., 407.

(2) 2 H. L. C., 1.

1875

Morgan v. Larivière.

answer to his claim it was a proper subject for an inquiry, and the inquiry here had been rightly directed.

This was not a suit against a foreign government, and, therefore, the objection to the jurisdiction did not arise. The appellants had constituted themselves by their own letter the agents and representatives of the foreign government, and had made themselves trustees of a fund which their own letter showed was held by them for the benefit of the respondent. If they made themselves liable to parties in this country, for acts to be done in this country, they could not turn round and say that the persons for whom they acted, and for whose purposes they had consented to become trustees of a fund in this country, were foreigners, and were not disposed to allow them to part with that fund. Their letter acknowledged the existence of that fund, charged themselves with being the holders of it for the benefit of the persons to whom that letter was written, and bound themselves to pay it over to those persons.

It might be that a foreign sovereign could not be compelled to submit to the jurisdiction of our courts, but that would not affect the duties and liabilities of those who had thought fit, for purposes of their own, or purposes of that foreign sovereign, to put themselves in his place, and who were acting for him, although actually native-born subjects of this country.

Mr. Pearson replied.

THE LORD CHANCELLOR (Lord Cairns): My Lords, this case was heard at your Lordships' bar a few days since, at which time we had the advantage of the presence and assistance of my noble and learned friend Lord O'Hagan, who is prevented by indisposition from being present to-day.

My Lords, the question arises with regard to the proper construction to be placed upon a letter written on the 1st of December, 1870, from the present appellants to the respondent, or those whom the respondent now represents. The 430] decrees of the *Court of Chancery, which are brought before your Lordships by way of appeal, proceed upon the footing that that letter constituted, in favor of the respondent, either an equitable assignment or a trust of a particular sum of money in the hands of the appellants, and the court proceeds to give directions for the administration of that sum as a trust fund.

My Lords, if that view of the letter to which I have referred was well founded, it would no doubt avoid the necessity of considering the position of the Government of France, which was said to be interested in the subject of the suit, but which

did not, although the opportunity was given, think fit to appear in the Court of Chancery. No doubt, under such circumstances, the court having a trust fund under its control, might well proceed to administer that fund, even although a foreign government might be interested in it, and might not be before the court, or subject to the jurisdiction of the court. But, my Lords, the first question to be determined is this: Was the view of the Court of Chancery, in treating this as in the nature of a trust, or of an equitable assignment, correct?

The only facts which need be adverted to are these: During the late war between France and Germany, a contract was made, between the then Provisional Government of France and Larivière and Des Minières, for the supply to the French of ball-cartridges. The date of that contract, or the date of its approval, is the 30th of November, 1870, and by the contract it is provided that the two contractors engage themselves to supply the French Government with 20,000,000 of ball-cartridges for rifles, according to a certain model, at a certain rate per thousand. The delivery was to take place in London. Out of the 20,000,000 of cartridges 7,000,000 were to be delivered before the 5th of December, 1870, and the remainder before the 10th of January, 1871, and time was to be considered as of the essence of the contract. Then the cartridges were to be "tried in London by a French delegate," that is to say, a delegate of the Provisional Government, "charged with this office," who was to "deliver a certificate stating that the cartridges were efficient for war service, and serviceable for the rifles of the model 1866." "The lots will immediately, after having been duly accepted on the responsibility of *the delegate of the [431] Minister of War in London, be paid for through the care of the French Ambassador, who will issue checks for the amount." That contract was, as I have said, approved of at Tours, then the seat of the French Government, on the 30th of November, 1870, and it was signed on behalf of the Minister of War, or by his order, by a M. Joulin, who describes himself as "the delegate," that is, the delegate of the Minister of War. That was the contract between the French Government and Larivière and his colleague.

The present appellants, Messrs. Morgan & Co., are bankers and financial agents in London. About this time they appear to have been engaged in raising a loan amounting to a very large sum of money for the French Government in the English market, and they had financial dealings on behalf of the French Government. And, my Lords, it appears that, for

1875

Morgan v. Larivière.

reasons which are sufficiently obvious, Messrs. Larivière and Des Minières, wishing to have some person to whom they could look in this country, for the purpose of satisfying the payments to be made under this contract, were anxious to have some information or assurance from Messrs. Morgan & Co. that payments would be made to them as they were due. It is, I think, obviously in answer to a wish of that kind that the letter which I am about to read to your Lordships of the 1st of December, 1870, was written.

My Lords, I said at the outset that it appeared to me to be, after all, a mere question of the construction of this letter; for I think your Lordships will be of opinion that there is no evidence whatever, to which we can attach any weight, of anything passing, by way of conversation or otherwise, between any of the parties, altering in any way what may appear to your Lordships to be the true construction of this letter. The letter is written in London, and addressed to Messrs. Belot des Minières & Larivière, and it is signed "J. S. Morgan & Co." It runs thus: "Gentlemen, we are instructed by Mr. L. Joulin" (M. Joulin, as your Lordships will remember, was the delegate of the Minister of War), "to advise you that a special credit for the sum of £40,000"—equivalent to one million francs—"has been opened with us in your favor, and that it will be paid to you ratably as the goods are delivered upon receipt of certificates of reception issued by the 432] French *Ambassador or by M. L. Joulin. We shall require receipts in duplicate for the payment or payments as made, and the surrender of this letter on the final payment under it being made." My Lords, I may pause for the purpose of observing that the word "ratably," which occurs in that contract, is obviously intended to have this meaning: the documents which were to be presented to Messrs. Morgan & Co. were certificates of the reception of a certain number of cartridges, but apparently were not to contain any mention of the price or of the sum to be paid; and I understand the term "ratably" to mean that payments would be made upon those certificates of reception, which would merely mention quantity, by reference to the contract, which would represent prices, so that a ratable proportion of the whole purchase-money under the contract would be paid according to the quantities stated in the certificates of reception.

But now, my Lords, arises the question: What is there in this letter which constitutes an equitable assignment, or what is there in it which impresses with a trust any particular sum of money? I can find no expression in this letter which could authorize such a conclusion. It appears to me

to be simply a statement by a banker that he has opened a credit under instructions in favor of a particular person. That is an expression well known to bankers, and well known to all persons engaged in commerce. It is simply an undertaking by the person who conveys that intimation that he will give credit, that he will pay, that he will allow himself to be made a person upon whom demands or drafts may be made for payment. Your Lordships are perfectly familiar with this, which occurs every day in commerce: a credit is opened with a particular house of business in favor of another house of business; generally a credit of that kind is, to use a mercantile phrase, "operated upon" by bills of exchange being drawn upon the house which undertakes to give the credit; but a credit of that kind may be operated upon also by means of checks, or it may be operated upon by simple demands, in any form, for the payment of the sum for which credit has been undertaken to be given.

My Lords, I read this letter as being nothing more than this: a statement by bankers to a tradesman who supplies goods to a customer of the bankers that they, the bankers, on behalf of their *customer, will act as paymasters to [433 the tradesman up to a certain amount of money; but that, in order to call upon them to act as paymasters, he, the tradesman, must bring with him a certain certificate showing that the goods have been delivered to their customer. In a transaction of that kind there is nothing of equitable assignment, there is nothing of trust; and it appears to me that any banker who had given an undertaking of that kind would be very much surprised to find that it was held that a certain portion of the funds of his customer in his hands had been impressed with a trust, had been equitably assigned, and had, in fact, ceased to be the moneys of the customer, and had become the moneys of the tradesman who was to supply the goods.

Now, my Lords, that is the whole of this case. I regret that, in the Court of Chancery, a great deal of very ingenious argument was spent upon the question of the amenability of a foreign government to the jurisdiction of our courts, and upon the farther question, whether, in the case of this particular contract, the dates which had been stipulated for as of the essence of the contract had, in point of fact, been waived. My Lords, it appears to me that these questions do not in any way arise unless there is first some foundation for the jurisdiction of the Court of Chancery. If this is, as it appears to me to be, merely a personal undertaking by bankers to make a payment, there is no room whatever for

1875

Morgan v. Larivière.

the jurisdiction of the Court of Chancery. It is a money demand; if it exists at all, it exists as a personal demand against Messrs. Morgan & Co.; and in a case of this kind, where there is no suggestion whatever of any incapacity on the part of Messrs. Morgan to meet any personal demand brought against them, it is only too obvious that these proceedings are simply an attempt to change the jurisdiction, and to bring that which ought to be the subject of demand, if at all, in an action at law, into the Court of Chancery, in order, by treating the case as a case for the administration of a trust, to get rid in some way of the stringency of the terms of the contract as to time.

My Lords, it appears to me that the case as one for the jurisdiction of the Court of Chancery entirely fails, and that the decree which ought to have been made by the Vice-Chancellor before whom it first came should have been a 434] decree dismissing *the bill with costs. I shall accordingly move your Lordships that the decrees complained of be reversed, and that the bill be dismissed with costs.

My Lords, I ought to add that my noble and learned friend Lord O'Hagan has informed me that, having considered the case, he concurs in the view which I have endeavored to express to your Lordships.

LORD CHELMSFORD: My Lords, the question of the liability of the appellants depends entirely upon the effect of their letter of the 1st of December, 1870, written to the respondent the day after the date of his contract for the supply of 20,000,000 of ball-cartridges to the French Government.

It was argued on the part of the respondent that the letter amounted to an equitable assignment or specific appropriation of the sum of £40,000, or that the appellants thereby constituted themselves trustees of that sum for the respondent. But opening a credit for a particular sum cannot constitute an equitable assignment or specific appropriation of that sum, but is merely an authority to the person in whose favor the credit is opened to draw to the extent of the specified amount. Nor, in my opinion, can the letter of the appellants informing the respondent that the credit had been opened (no sum being set apart or appropriated as a specific fund to be drawn upon) constitute them trustees of the amount for which the respondent is to be at liberty to draw. Even if it can be said to amount to a trust, is it one which a court of equity would enforce, being purely voluntary and without any consideration? The money in the hands of the appellants belonged to the French Government, who

might, for anything that appears, have withdrawn the whole of it. Suppose the government had done so, and the agents had continued to accept and give certificates for cartridges manufactured by the respondent, could the appellants be compelled to pay for them although deprived of all the funds by reason of the possession of which they opened the credit? If there had been a trust impressed upon an appropriated sum of £40,000, they would have been bound to do so, although they could not have resisted the demand of the French Government for the restoration of the [435 whole of the moneys. Suppose all the funds had thus been withdrawn, and the French Ambassador had afterwards improperly given checks upon the appellants for cartridges delivered and accepted, would a court of equity have said the £40,000 was impressed with a trust, and it was a breach of that trust to part with it, and therefore the appellants must pay the contractor, who is armed with all that is necessary to establish his right to payment, and looks for indemnity to the French Government?

By the contract, the payments for the cartridges are to be made by checks drawn not by the respondent but by the French Ambassador, and by the appellant's letter payment is to be made upon receipt of certificates issued by the French Ambassador or M. Joulin. Suppose the certificates withheld, or the checks not drawn, without any good reason for their not being drawn, could the court have been justified in ordering payment by the appellants, such payment not being sanctioned in the manner prescribed by the proper authorized agent of the French Government?

It was suggested in argument, that if proper certificates of reception of cartridges had been received, and (it should have been added) checks had been drawn by the Ambassador, and the appellants had refused to pay, an action might have been maintained. But I entertain great doubt whether there would have been held to be a sufficient consideration to support a promise at law, even if the letter amounted to a promise, which is by no means clear to my mind. However, it is sufficient to say that the letter on which the question depends created no trust, and therefore the decree cannot be supported.

But although this disposes of the question I must not altogether omit the question as to the waiver of the time within which the contract was to be performed. One can well understand how important it was to the French Government that every dispatch should be used in the delivery of the cartridges to be supplied by the respondent; and there-

1875

Morgan v. Larivière.

fore it was stipulated that time should be considered of the essence of the contract. Now the respondent did not in any instance adhere to the limit of time. Instead of delivering 436] 7,000,000 of cartridges before the 5th of December, *he delivered only 870,000 on the 24th of December. But the time for delivering and also the quantity to be delivered at this first period were waived, the cartridges having been accepted, and the sum of £5,313 3s. paid for them. Of course, the waiver of the time in this instance did not set the respondent free from the necessity of observing the limit of time fixed for the delivery of the undelivered quantity of cartridges.

But the respondent alleges that time was also waived as to the performance of the remainder of the contract. The respondent states that Messrs. Joulin and Boulanger, agents of the French Government to superintend the manufacture of the cartridges, suggested alterations in the form of the cartridges which necessitated a change in the tools and machinery employed, thereby causing considerable delay in the work, so that he was prevented from delivering the residue of the cartridges on the 10th of January, 1871, which he says he would otherwise have been able and was prepared to do, and that he applied to the agent of the committee (not naming him) to extend the time, which the agent verbally agreed to do. The respondent also states that on the 10th of January the accredited agent of the committee approved and accepted 300 cases of cartridges, and by a letter to Captain Bourdreaux, who was charged with the duty of granting the proper certificates, advised him of his acceptance thereof, and that afterwards farther parcels of cartridges were approved of and accepted by another agent.

The time, therefore, is said to have been enlarged verbally by an agent of the French Government. But the agent, whose employment was only to see that the cartridges were manufactured according to the contract, could have no authority to enlarge the time, which is expressly stipulated shall be of the essence of the contract. And with respect to the cartridges said to have been supplied and accepted on the 10th of January, and afterwards, but for which no certificates were granted, how can the appellants be liable for them? Even supposing that Captain Bourdreaux improperly refused to grant certificates, what have the appellants to do with that? Their engagement is to pay, not upon the mere approval and acceptance of the cartridges, but 437] *upon receipt of certificates of reception issued by the French Ambassador or by M. Joulin.

Nor was the withholding of the certificates an unjustifiable act, as it was evident that the respondent was wholly incapable of performing his contract within the stipulated time. Instead of the first delivery of 7,000,000 of cartridges by the 5th of December, he had been able to manufacture and deliver no more than 870,000 on the 24th of December. It was clear, therefore, that between that day and the 10th of January it was not possible for him to have prepared the remaining quantity, being upwards of 19,000,000. If every other question, therefore, had been determined in the respondent's favor, how could he possibly claim from the appellants any farther sum than that which he has received from them, not being able to produce to them the requisite evidence that they were entitled to make him any payment upon the terms of their letter?

I agree, therefore, my Lords, with my noble and learned friend that the decrees ought to be reversed.

Decrees appealed against reversed; and bill dismissed with costs.

Lords' Journals, 11th February, 1875.

Solicitors for the appellants: *G. M. Clements, for Bonham, Dalrymple, Drake & Co.*

Solicitors for the respondent: *G. R. Innes & Son.*

Where a cross bill to a bill of foreclosure, brought by a party representing the British government, set up an independent claim by the respondents against the British government, it was held to be a matter which upon general principles of equity could not be set up by a cross bill. And it was held that it was not a sufficient ground for sustaining the cross bill, that the British government could not be sued, and that the respondents would be without remedy, unless they could enforce their claim by a cross bill in the suit.

There is no principle of equity which will enable a creditor to seize the property of his debtor and appropriate it to the payment of his debt, merely because the debtor is privileged from liability to be sued: and it would be a fraud upon the privilege itself, to use the appearance of such party in court for another and distinct purpose, as the occasion of making him respond to a claim that otherwise he could not be sued on.

Such a claim could be set off against the mortgage debt: *Rowan v. Sharp's Rifle, etc.*, 33 Conn., 2.

To same effect as last proposition see *Hunt v. Chapman*, 55 N. Y., 555; and see *Peck v. Minot*, 3 Abb. Court of Appeal Dec., 465.

Where a foreign government comes voluntarily as a suitor into a court of law or equity, it becomes subject, as to all matters connected with that suit, to the jurisdiction of a court of equity, and is bound to answer a cross bill properly filed, on the personal oath of the sovereign: *King of Spain v. Hulett*, 1 Clark & Finnelly, 333; 1 Dow & Clark, 169; 7 Bligh, N. S., 359. This case is not necessarily in conflict with *Rowan v. Sharp's Rifle, etc.*, 33 Conn., 2, as in that case it was very properly held the party filing the cross bill was not entitled to maintain it, but should have pleaded the matter set up in the cross bill by way of set-off in the original suit. As to the other propositions laid down in the Connecticut case, it is clearly contrary to the current of authorities. See also Story's Conf. of Laws, § 565; *Queen of Spain v. Parr*, 18 Weekly's R., 110; *U. S. v. McRae*, L. R., 8 Eq., 69; *U. S. v. Wagner*, L. R., 8 Eq., 724, re-

1875

Morgan v. Larivière.

versed L. R., 2 Chy. App., 582; *Duke of Brunswick v. King of Hanover*, 2 H. L. Cas., 1, 6 Beav., 1; *Rothschild v. Queen of Portugal*, 3 Y. & Coll., Exchq., 594; 1 Wait's Prac., 97-8; 6 id., 360-3.

Unless however the foreign government voluntarily comes into court, our courts have no power nor authority over it nor over its property, notwithstanding such property is within our territorial limits: *Leavitt v. Dabney*, 37 How. Prac. Rep., 264; 7 Rob., 350; 3 Abb., N. S., 469, and see 2 Sweeney, 613; 9 Abb., N. S., 373; 40 How. Prac., 277.

And a bill of discovery will not lie against the sovereign of another country unless he be a party plaintiff to some other suit pending in the courts of the forum to which the bill for discovery is ancillary: *Queen of Spain v. Glynn*, 7 Clark & Fin., 486.

Otherwise if the foreign sovereign or government be a party to such principal suit: *Pristeau v. U. S.*, L. R., 2 Eq., 659; *Rothschild v. Queen of Portugal*, 3 Y. & Coll. Excheq., 594.

Consequently, where funds of a foreign government are in the hands of its agent, residing here, for the alleged purpose of being paid to the creditors of that government who also reside here, our courts being without jurisdiction over the principal—the foreign government—have no jurisdiction over its agent here. And being without jurisdiction over the parties, they cannot proceed *in rem* to dispose of its property in favor of resident creditors: *Leavitt v. Dabney*, 37 How. Prac. Rep., 264; 7 Rob., 350; 3 Abb. Prac., N. S., 459; and see 2 Sweeney, 613; 9 Abb. Prac., N. S., 373; 40 How. Prac., 277.

See *King of Spain v. Oliver*, 2 Washington C. C. Rep., 429; 1 Wait's Prac., 97-8; 6 id. 360-3.

A foreign sovereign or government may properly be made a defendant in a suit in our courts, for the purpose of giving him or it an opportunity to appear and to enable the court to do ample and complete justice; but if he or it fail to appear the suit is so far a nullity, as the joinder is but an invitation: *Manning v. State of Nicaragua*, 14 How. Prac., 517.

A sister state cannot be sued in the courts of this state, by attaching its funds in the hands of one of its officers:

Stockwell v. Bates, 10 Abb. Prac. Rep., N. S., 381.

Where a sovereign power enters into a private contract, through an agent, with a citizen of another state, it cannot be coerced by the courts of the latter state, by a suit against such agent: *Allen v. Bareda*, 7 Bosw., 204.

If a foreign government sue in our courts, it may be required to give security for costs, and if it interfere to prevent the defendant from obtaining material testimony within its domain, the court will stay the proceedings: *Republic of Mexico v. De Arangois*, 3 Abb. Prac. Rep., 470.

As to when an order upon a particular fund operates and when it does not operate as an assignment thereof, see 7 Eng. Rep., 69 note.

When an order is drawn for the whole of a fund, it is an equitable assignment of it and binds the fund in the hands of the drawee after notice: *Jermyn v. Moffitt*, 75 Penn. St. R., 399; *Derner v. Brown*, 1 MacArthur, 350.

Provided a consideration be paid therefor: *Alger v. Scott*, 54 N. Y., 14; *Risley v. Smith*, 89 N. Y. Superior Ct. Rep., 137.

An order drawn for part of a fund is not an assignment, unless the drawee accepts the draft, or an obligation to accept may be implied from the custom of trade or course of business between the parties: *Jermyn v. Moffitt*, 75 Penn. St. Rep., 399.

But see to the contrary: *Hall v. Dorchester, etc.*, 111 Mass., 53; *McCubbin v. City of Atchison*, 12 Kansas, 166; *Broome v. Bisby*, 14 Florida, 21; *Risley v. Smith*, 39 N. Y. Superior Court Rep., 137; *Gallagher v. Nichols*, 16 Abb., N. S., 337 & 60 N. Y., 38.

An assignment which proposes to transfer a debt for wages not yet earned against any person who may thereafter employ the assignee, although there be notice of the assignment to the employer, is insufficient without his acceptance: *Jermyn v. Moffitt*, 75 Penn. St. Rep., 399.

So it has been held of an order upon an employer to be charged to account of wages to be earned under an existing contract and accepted by the employer if it be worked by the employee before payment: *Shaver v. Western Union, etc.*, 57 N. Y., 459.

But see *Young, etc., v. Wardens, etc.*, 61 Barb., 489; *Risley v. Smith*, 39 N.Y. Supr. Ct. R., 137; *Gallagher v. Nichols*, 16 Abb. Prac., N. S., 347, 60 N.Y., 88; *Derner v. Brown*, 1 MacArthur, 350.

Where a contractor with a city, after doing a portion of the work thereunder, assigned the contract, the city is liable to the assignee for the remainder of the work.

But the contractor having before assignment given orders upon the city, and having stipulated in and by the assignment that those orders should be first paid and only the balance on the contract go to the assignee, the latter cannot on completion of the contract recover from the city the entire amount due on the contract: *McCubbin v. City of Atchison*, 12 Kansas, 166.

Had there been no clause in the assignment requiring the orders already given to be first paid, such orders would have been considered as equitable assignments only to the extent of the work done at the time of the transfer and not for the amount of the orders if for a greater amount than for work then done: *McCubbin v. City of Atchison*, 12 Kansas, 166.

The drawer of a check appropriates the amount it calls for out of the deposit to his credit in the bank at the time of its date, and he has no right to withdraw it afterward: *Derner v. Brown*, 1 MacArthur, 350; *Emery v. Hobson*, 63 Maine, 32.

Contra, *Duncan v. Berlin*, 60 N. Y., 151; otherwise as to a draft accompanying a bill of lading: *Cayuga, etc., v. Daniels*, 47 N. Y., 631.

If the holder of a check delays presenting it until the bank fail, the loss will be his and not that of the drawer: *Derner v. Brown*, 1 MacArthur, 350.

But if the maker has withdrawn from the bank his entire deposit against which the check is drawn, he is not injured by any delay in presenting it, or any lack of formal notice of its non-payment, before action brought: *Emery v. Hobson*, 63 Maine, 32.

To create, for future services of a contractor, a lien upon particular funds of his employer, there must be not only the express promise of the employer to apply them in payment of such services, upon which the contractor relies, but there must be some act of appropriation on the part of the employer relinquishing control of the funds, and conferring upon the contractor the right to have them thus applied when the services are rendered.

In an indenture of mortgage executed by a railroad corporation to trustees to secure bonds issued to raise moneys to pay off its existing indebtedness, and to complete and equip its road, the corporation covenanted with the trustees, among other things, that the expenditure of all sums of money realized from the sale of the bonds should be made with the approval of at least one of the trustees, and that his assent in writing should be necessary to all contracts made by the company before the same should be a charge upon any of the sums received for such sale: *held*, that a contractor, agreeing with the corporation to construct a portion of the road, and obtaining the assent of two of the trustees to his contract, and subsequently doing the work, did not acquire any lien for the payment of his work, under this covenant of the indenture, upon the funds received by the corporation from the bonds: *Dillon v. Barnard*, 26 Wallace, 430.

[Law Reports, 7 House of Lords, 438.]

Feb. 15, 16, 1875.

***DOROTHEA YATES, Appellant; and UNIVERSITY COLLEGE, LONDON, and C. T. D'EYNCOURT, Respondents.** [438]

Will—Bequest—Condition—Performance—Vesting—Practice.

The expression of an intention accompanying a bequest does not, necessarily, constitute a condition on which the bequest is to take effect, or be defeated. The testator may not do that which would fully effectuate his expressed intention, and yet the bequest may be valid.

(¹) Affirming 5 Eng. Rep., 664.

1875

Yates v. University College, London.

A testator left certain specified personalty to his wife for life, and after her death provided as follows, "I give and bequeath the same, &c., unto University College, London, for the purpose of founding in it a new professorship in Archæology, for the regulation of which professorship I purpose preparing a code of rules and regulations, which I intend to authenticate under my hand." As soon as convenient after his decease, the fact of his bequest and a copy of the rules were to be communicated to the college, and the college was, within twelve months afterwards, to signify in writing by the president, &c., the acceptance of the said rules; and if the college should decline or refuse to accept the rules, or should not within twelve months signify acceptance thereof, the bequest of the stock and shares was to be wholly null and void, and the stock and shares were to sink into and form part of the residuary estate. The testator died without making any rules:

Held, that the will contained a clear and valid bequest, which was not affected by the subsequent provisions, nor by the non-acceptance of intended rules and regulations, the acceptance of which had, by the act of the testator himself, been rendered impossible.

The House will not, on the application of a person not an appellant against a decree, make an alteration in it. If a change in the details of the decree should be necessary, his application for it should be made in the court below.

THIS was an appeal against a decision of Lord Chancellor Selborne and Lord Justice Mellish, by which a previous decree of Vice-Chancellor Bacon had been reversed⁽¹⁾.

James Yates (the husband of the appellant), by his will, dated the 24th of February, 1864, gave a sum of £3,980 consolidated stock of the North Western Railway Company, and all the stock he might possess in that company at the time of his death, to his wife for life, subject to payment by her of £25 to Mr. Morris, the professor of Mineralogy and 439] Geology at University College, London, *during their joint lives, "And after the decease of my said wife, I give the said stock, shares, &c., to University College, London, upon trust to pay the annual income thereof to the professor of Mineralogy and Geology for the time being of that college, as an endowment of the said professorship." He then gave several other railway and other stocks to his wife for life, and after her death he gave the same and the dividends, &c., "unto the said University College, London, for the purpose of founding in it a new professorship of Archæology, for the regulation of which professorship I purpose preparing a code of rules and regulations, which I intend to authenticate under my hand. And I hereby expressly declare my mind and will to be that, as soon as conveniently may be after my decease, my executors shall communicate to the said University College the fact of my said last-mentioned bequest to the said college, and a copy of the said rules and regulations; and the said University College shall, within twelve calendar months next after the fact of the said bequest shall have been so communicated by my said executors as aforesaid, signify by writing under the hand of their president, treas-

(1) Law Rep., 8 Ch. Ap., 454; 5 Eng. Rep., 664.

urer, or secretary, their acceptance of the said rules for the future regulation of the said professorship. And I farther declare that if the said University College shall decline or refuse to accept the said rules for the regulation of the said professorship, or shall not within the space of twelve calendar months signify to my executors in manner aforesaid their acceptance of the same, then I declare that the said bequest of the said stock, &c., and every other legacy and bequest herein, or in any codicil hereto, contained, in favor of the said University College, shall be wholly null and void, and the said stock and shares and all other benefits, hereby, or by any codicil hereto, by me intended for the said University College shall sink into and form part of my residuary estate." He then, "but subject to the conditions aforesaid," gave all his books on mineralogy and geology, and his mineralogical and geological specimens, &c., to the college, and went on thus: "And I also give to my great nephew Henry Yates Thompson, if living at my death, but if he be not then living, then to such person as, if there be no females living at my decease, would be my heir-at-law, my share in the same college, with the intent that the same share shall always be held and enjoyed by *my heir-at-law for the time [440 being, so that he may have means of knowing whether my various bequests in favor of the college and the two aforesaid professorships, are applied and maintained as I have endeavored to prescribe and appoint." He directed that the legacies given by him to any public institution should be paid out of his "personal estate, and not out of his real or leasehold estate." No deduction was to be made for legacy duty, and he gave all his freehold and leasehold estate and all his moneys, stocks, and shares not otherwise disposed of, for the absolute use of his wife and her heirs and assigns; and he appointed his wife, Mr. Crompton and Mr. D'Eyncourt, executors of his will.

The testator died on the 7th of May, 1871, without having revoked or altered his will, which was duly proved by his widow and Mr. D'Eyncourt; Mr. Crompton renounced.

The testator never framed any rules and regulations for the professorship, and his widow claimed the shares and stocks, &c., insisting that, under the circumstances, the gift of them to the college had become wholly void; but she declared her readiness to pay the £25 a year to Mr. Morris during their joint lives. On the 21st of December, 1871, she filed her bill against the University College, London, and against Mr. D'Eyncourt, praying for a declaration that she was absolutely entitled to the funds in question. The respondents

put in their answers to the bill, and the motion for a decree came on for hearing before Vice-Chancellor Bacon, on the 2d of December, 1872, when his honor made a decree declaring that, in the events which had happened, the bequest in favor of the University College was wholly null and void, and the shares, &c., formed part of the residuary estate of the testator. On appeal, the Lord Chancellor (Lord Selborne) and Lord Justice Mellish reversed this order, declaring that the gifts in favor of the University College were valid. This appeal was then brought.

Mr. *E. E. Kay*, Q.C., and Mr. *Forbes Hallett*, for the appellant: The Vice-Chancellor rightly treated the words relating to the preparation and acceptance of the rules and regulations as constituting a condition which must be strictly performed. If the performance of that condition failed, all 441] failed. There are many *other legacies in the will; to no one of them is any condition attached. Here a condition was attached: it was a condition precedent; it was one which entirely depended on the testator's voluntary act; he imposed the condition and he has shown by his subsequent conduct that he intended the performance of that condition to be rendered impossible. The gift therefore failed. In fact, he did not, upon reflection, intend that his original idea of a gift to the college to found a professorship should ever take effect. He changed his mind, and rendered his gift impossible. He did not in form recall the bequest in his will; he believed that to be unnecessary; he thought that, if he did not make the regulations, the making and acceptance of which constituted a real condition precedent to the foundation of the professorship, the bequest he had at first made would necessarily become void. He simply abstained from doing that which he thought was necessary to give effect to the bequest, and he believed the bequest to be at an end. He had, in fact, shadowed forth such a result when he expressly declared that if the regulations he intended to make were not accepted, and accepted too within a given time, and accepted by certain formal declarations, the amount of the bequest should sink into the residue. He believed the acceptance of his rules to be imperative and unavoidable, and he purposely rendered the acceptance of them impossible. He did not intend simply to found a professorship, but meant to found one of a particular kind, subject to such rules and regulations as he should impose. Its form and government were to be the subject of his creation: if not so formed and so governed, he did not mean that it should exist at all. In all probability he could not satisfy himself on these points,

and so he abandoned altogether the idea of founding the professorship, believing that it could never come into existence without his code of rules and regulations was first accepted. This is the plain construction of the will, and of his conduct in reference to it. Where a condition of this sort has been imposed it must be observed, and cannot be dispensed with even by an apparent assent of the donor: *Davis v. Angel* (*), where there was a gift to J. D. in case he should marry the testator's niece E. G. J. D. married during the testator's lifetime and with the testator's assent, another lady, and *it was held by the Master of the Rolls first, [442 and afterwards on appeal by Lord Chancellor Westbury, that the condition being precedent could not be removed by the assent; and his Lordship said: "What we are dealing with is a bequest contained in a will dependent for its existence upon the happening of a particular event, and the argument is, that the testator, by some conduct or act subsequent to the making of the will, has in effect struck that condition out of the will, and made the bequest, which is a conditional one, absolute. I do not think that it would be possible, in the present state of the law, to contend that any act of the testator, independently of writing—independently of a testamentary act—could have that effect." The same principle had been long before acted on in *Lloyd v. Branton* (*); and in *Burgess v. Robinson* (*); and *In re Hodge's Legacy* (*) a similar rule was enforced, though in each of the two earlier cases non-compliance with the condition had arisen from the complete ignorance of the legatee that the gift to him was the subject of any condition whatever. *Hervey v. Aston* (*) is a strong authority to the same effect, and all the stronger because the condition there was in restraint of marriage. Though the first words of the gift here appear to amount to an absolute bequest, they must not be separated from the other words in the will relating to that gift, for that would be to defeat the plain intention of the testator, which was to make himself the lawgiver of the professorship he proposed to found. When he spoke of the gift and of the rules and regulations being communicated to the college, he put the two things together; and it was plainly his idea that they were not to be separated, but that the acceptance or non-acceptance of both should be identical. He proposed to found a professorship of a perfectly new kind. Archæology

(*) 31 Beav., 223. On appeal, 4 De G., F. & J., 524.

(*) 3 Mer., 108; see *Youngs v. Furze*, 8 De G., M. & G., 756.

(*) 3 Mer., 7.

(*) Law Rep., 16 Eq., 92.

(*) 1 Atk., 361; Cas. t. Tal., 212, 317.

1875

Yates v. University College, London.

was a new thing; the term itself was indefinite, and he intended to give this new professorship a form that should be entirely his own. He could not satisfy himself as to the mode of doing this, and so he abandoned altogether the idea which had at first attracted him. He did not intend that the fact of the bequest should be communicated until the rules 443] should be communicated too, and *the acceptance of the gift he intended to be dependent on the acceptance of the rules. As he made no rules, there could be no communication of them; and he did not intend that there should be any communication of the bequest any more than of the rules. The performance of the conditions was sufficiently enforced by the direction that the bequest, if not accepted as he required, should fall into the residue, which was thus made fully effective as a formal gift over.

Mr. *Hinde Palmer*, Q.C., appeared for the executor.

Mr. *Fry*, Q.C., and Mr. *Cozzens-Hardy*, for the college, were not called on.

The LORD CHANCELLOR (Lord Cairns): My Lords, the question which has been raised by this appeal appears to me to admit of no doubt whatever, and I think it cannot fail to have struck your Lordships that in arguing the case at the bar the learned counsel for the appellant were driven to rest their case rather upon the effect of a gift over than upon a consideration of the meaning of the original bequest. Now, my Lords, I quite agree that if it could be found that in the original bequest there was something which required to be supplemented, so that you could not predicate of it that it was a complete bequest without the supplement, and if that supplement had not been applied or added, the bequest would have remained incomplete, and no legatee could have claimed under it. But on the other hand, if the original bequest is in itself complete, the only question which your Lordships have to inquire into is this: Is there anything in the subsequent part of the will which takes away that which originally was given?

My Lords, the original bequest was this: After leaving the property in question to his wife for life, the testator proceeds thus: "From and immediately after her decease, then I give and bequeath the same stock and shares, and the dividends, interest, and annual income thereof, unto the said University College, London, for the purpose of founding in it a new professorship of archæology." Now, stopping there, it appears to me beyond all doubt that this 444] is a complete bequest. It is a complete bequest *to the university upon trust, and the trust is sufficiently de-

fin'd to be the foundation, establishment and constitution of a professorship, which in the college was to be a new one; there had been none of the same kind before; it was called a professorship of archæology. No doubt archæology is a very large word. It may, as was well stated by the learned counsel who last addressed your Lordships, be limited in particular cases to the antiquities of particular nations only, or to those antiquities which range over a limited portion of time; but not being limited in any such way, it stands applicable to all the expanse which it, of itself, may cover. The word is a term of art perfectly well known. What it denotes is a science in itself; it has a perfect and complete meaning; and it not being limited here in any way, this professorship was to be a professorship of archæology in the largest sense of the term.

Now, my Lords, is there anything in the words which immediately follow making that original bequest, which appears from the words I have read to be complete, really incomplete? I can find nothing whatever which has that effect. The additional words are, "for the regulation of which professorship I purpose preparing a code of rules and regulations which I intend to authenticate under my hand." I read this as not imposing any infirmity or incompetency upon the bequest, but merely as a statement of the intention of the testator at the time the will was framed, that at some future period he proposed preparing a code of rules for the regulation of the professorship, which, if he did prepare them, would regulate the details necessary to be regulated with regard to the professorship; but which, if he did not prepare them, the framing of rules would naturally fall to the University College, in which the professorship was to be created. I can find nothing here in any way approaching to the nature of a condition, and consequently the argument with regard to cases founded upon conditional bequests, has no application whatever to this bequest in its original constitution.

But, my Lords, although you have a complete bequest in the first instance, no doubt there may afterwards be a condition, clear in its terms, and which, by reason of the events that have happened, must be read as part of the original bequest. What is said to be the condition which comes subsequently, and which, if it exists at all, must be a divesting condition? "I hereby expressly *declare my will and [445 mind to be, that, as soon as conveniently may be after my decease, my executors shall communicate to the said University College the fact of my last-mentioned bequest to the

1875

Yates v. University College, London.

said college and a copy of the said rules and regulations." What "rules and regulations"? Rules and regulations which at the time he made his will he was minded at some subsequent period to prepare. But if he did not prepare any such rules and regulations, how could his executors communicate them to the college? And if they were not communicated to the college, how could the fact of the non-communication of rules, which had no existence in any way, interfere with the bequest? He proceeds thus: "And the said University College shall, within twelve calendar months next, after the fact of the said bequest shall have been so communicated by my said executors as aforesaid, signifying by writing, under the hand of their president, treasurer, or secretary, their acceptance of the said rules for the future regulation of the said professorship. And I farther declare that if the said University College shall decline or refuse to accept the same rules for the regulation of the said professorship, or shall not, within the said space of twelve calendar months, signify to my executors, in manner aforesaid, their acceptance of the same, then I declare that the said bequest of the said stock, shares, and debentures, and every other legacy and bequest herein, or in any codicil hereto contained, in favor of the said University College, shall be wholly null and void, and the said stock and shares, and all other benefits hereby, or by any codicil hereto, by me intended for the said University College, shall sink into and form part of my residuary estate."

Now, my Lords, it appears to me that the effect of that whole *catena* of directions depends upon the meaning which your Lordships give to the two words "said rules"; the whole hangs upon those two words. If "said rules" mean, as I think they clearly must mean, "rules to be prepared by me," and if those rules are not prepared by the testator, then there can be no refusal, no declining, no failure to accept that which has no existence. And then, going back to the original bequest, if the making of those rules is not of the essence of the original bequest, the whole of this claim of subsequent directions may be actually struck out of the will.

446] *My Lords, it was this view of the case which was taken by the Lord Chancellor and the Lord Justice in the Court of Appeal in Chancery. I venture to think that their order is entirely correct; and I submit to your Lordships that this appeal should be dismissed with costs.

LORD CHELMSFORD concurred.

LORD HATHERLEY: My Lords, I too entirely concur, and for the reasons stated by the Lord Chancellor.

The question wholly depends upon the construction of the will, and authorities are of no value in this case. There is a clear original gift, and the testator then indicates an intention which he has not performed. He does not express any condition, or anything that amounts to a condition. If the intention had been carried out, no doubt there might have been some ground, which there is not now, for contending that in the event of the rules not being accepted the property was to go over.

I may just call attention to one thing set forth in the appendix to the printed case. There we find that certain shares are to go to his heir-at-law, and are always to be held by his "heir-at-law for the time being, so that he may have means of knowing whether my various bequests in favor of the college and the two aforesaid professorships are applied and maintained as I have endeavored to prescribe and appoint." So that he clearly points to the thing as done in the will; he wishes the bequests to be applied for the professorships, and he wishes them to be maintained "as I have endeavored to prescribe and appoint." I think it would be a very strange reading of the previous passage as to his then intention to frame rules, to say that you are to include in what he has "endeavored to prescribe and appoint" the necessity of accepting certain rules which he has not made. It is quite clear that he thinks he has founded and endowed the professorships, as he had determined to found and endow them; he has given some books and other articles to the Professor of Mineralogy and Geology, and some other articles to the Professor of Archæology; he has prescribed and appointed certain things with reference to those *pro- [447 fessorships, and he speaks of his bequests as a clear gift at all events, for he says: "Hereafter I have some notion of making other rules, and if I do make them and they are not accepted, then there is to be a gift over." The appeal must be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Mr. *Hinde Palmer*: Will your Lordships pardon me for a moment? I appear for the legal personal representative of the testator, and my instructions are that if this gift to the college prevails, as it will now, there will be an insufficiency of the general personal estate to pay the testator's debts and funeral and administration expenses. The consequence will

1875

Fulton v. Andrew.

be, as your Lordships will see in a moment, that all the specific legatees, including the college in whose favor your Lordships have just decided, will have to abate ratably and proportionately to make up that deficiency. In the decree made by the Lord Chancellor he simply declared that the college was entitled under the gift, and nothing more. Therefore, what I am going to suggest to your Lordships as something to be done now, is, that there should be what the bill prays for if necessary, namely, an account taken in the usual way to ascertain what this deficiency is, and then ratably to make it up out of the provisions for the specific legatees.

The LORD CHANCELLOR: My Lords, it is not your Lordships' habit to hear suggestions with regard to alterations of a decree made on the part of a person who is not himself an appellant before your Lordships, and who does not challenge any part of the decree. It would be quite irregular upon a suggestion of that kind to make any alteration in a decree. If in the administration of the estate any change should be necessary, in consequence of what your Lordships have now done, it is in the Court of Chancery that the application should be made for that change.

Lords' Journals, 16th February, 1875.

Solicitors for the appellant: *Hyde & Tandy*.

Solicitors for the respondent: *Cookson, Wainewright & Pennington*.

[Law Reports, 7 House of Lords, 448.]

Feb. 9, 16, 1875.

448] *W. SCOTT FULTON, ISABELLA D. FULTON, and MARGARET FULTON, Appellants; and CHARLES BATTY ANDREW and THOMAS WILSON, Respondents.

Will—Execution—Residuary Clause—Verdict—New Trial—Judgment.

A will was propounded for probate. A caveat was entered. The Court of Probate directed the case to be tried at the assizes; it was so tried on six issues. The first four required a determination of the fact whether the testator was of sound mind and understanding, capable of making a will; the fifth, whether he knew and approved of the contents of the will; the sixth, whether he knew and approved of the residuary clause. That clause was the last in the will, and, by it, the propounders of the will were made the residuary legatees, and were appointed executors. Evidence having been taken, the judge at the trial asked the opinion of the jurors on every one of the issues. They found for the propounders of the will on the first five issues, but for the opponents on the sixth. No leave to set aside the verdict and enter judgment for the propounders, notwithstanding the verdict on the sixth issue, was reserved, but when the case came before the Court of Probate a rule was obtained

to set aside the verdict generally, and have a new trial, or to set aside the verdict on the sixth issue for misdirection. On argument, the judge of the Court of Probate made the rule absolute to enter the verdict for the propounders of the will, and granted probate of the whole will, including the residuary clause:

Held, that this judgment was irregular, and could not be sustained.

By the 40th Rule of Proceeding in the Probate Court (1865), made as to contentious business, it is required that any party having pleaded certain pleas as to the competency of the testator and the validity of the execution of the will, shall give particulars in writing, stating shortly the substance of the case he intends to present to the court, and no other defence shall be available. The particulars delivered in this case set forth that, "at the time of the execution of the alleged will the deceased was in a state of mental prostration brought on by habitual drunkenness and disease of the brain, and that when he executed the alleged will he was not conscious of, and did not approve of, the contents of the alleged will or of the residuary clause":

Held, that these particulars could not be construed as restricting the defendants to proof that the non-approval of the residuary clause was alone occasioned by mental prostration brought on by habitual drunkenness and disease of the brain.

Per LORD HATHERLEY: Those who take a benefit under a will, and have *been [449] instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction.

There is no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all farther inquiry is shut out.

THIS was an appeal against a decision of Lord Penzance, as judge of the Probate Court, dealing with a verdict given on a trial which took place at Liverpool before Mr. Justice Mellor.

The question arose with respect to the will of one Hugh Harrison. The first-named appellant was the father and guardian of the other two appellants, all being legatees. The two respondents claimed to be the residuary legatees under Harrison's will.

Hugh Harrison of George Street, Manchester, the testator, made his will, dated the 11th of June, 1870. He was at that time resident at Ivy House, Appleby, in the county of Westmoreland, and was so described in the will. His will was (so far as is material to be referred to in this case) in these terms: "To my nieces Isabella and Margaret, the children of my late sister Isabella Braithwaite Fulton, each, the sum of £1,000, for their separate use, when they shall respectively attain the age of twenty-one." There were then several individual legacies, among which were, "To my friend Charles Batty Andrew £1,000," and, "To my friend Thomas Wilson £100." And the will went on, "I direct my Natural History collection, and the books on that subject, to be sold at the discretion of my executors hereinafter named." There were then again individual legacies, and the will went on, "All my freehold estate or farm at Sandford, in the parish of Warcop, Westmoreland, occupied by John Fleming, I devise to my nephew William Fulton, but in case he should

1875

Fulton v. Andrew.

die before attaining the age of twenty-one years, then I devise the same estate to my cousin Anthony Harrison and his heirs. All the residue of my real and personal estate I devise and bequeath equally to the said Charles Batty Andrew and Thomas Wilson, whom I appoint to be executors of this my last and only will." The will was signed "Hugh Harrison," and the witnesses were, "William Barnes, printer, Appleby," and "John Nanson, bank agent, Appleby."

The will being contested, it was, on the 18th of July, 1871, 450] *ordered by the Court of Probate that certain questions of fact should be tried at the assizes for Northumberland. The executors, who were the persons propounding the will, were to be the plaintiffs; the present appellants were to be the defendants in the trial.

The declaration in the Court of Probate set forth the execution of the will in the usual form. On the 2d of June, 1871, the defendants pleaded five pleas, which formed the substance of the first five issues finally settled for trial. Another plea was afterwards added by permission of the court.

By rule 40a of the Rules and Orders in the Probate Court (1865) as to contentious business, it was declared that any party pleading certain pleas therein described shall therewith deliver to the adverse parties, and file in the Registry, "particulars" in writing, stating shortly the substance of the case he intends to set up thereunder, and "no defence shall be available thereunder which might have been raised under any other of the said pleas, unless such other pleas be pleaded therewith."

The "particulars" delivered in accordance with the above rule were in these terms: "That the deceased, at the time of the execution of the said alleged will, was in a state of mental prostration, brought on by habitual drunkenness and disease of the brain, and that he was not, in fact, when he executed the said alleged will conscious of, and did not approve of, the contents of the said alleged will, or of the residuary clause."

The plaintiffs, by their replication, took issue on all the matters raised by the defendants' pleas.

By an order dated the 18th of July, 1871, it was directed that the following questions of fact should be decided by the jury: "1. Whether the paper writing bearing date the 11th of June, 1870, and alleged to be the last will of Hugh Harrison, was executed according to the statute 1 Vict. c. 26? 2. Whether at the time the will bears date the deceased was of sound mind, memory and understanding? 3. Whether

the execution of the will was obtained by the undue influence of T. Wilson and C. B. Andrew? 4. Whether the execution of the alleged will, in so far as it relates to the residuary clause, was procured by the influence of the said plaintiffs? 5. Whether the deceased, at the time of the execution *of the will, knew and approved of the contents of the will? 6. Whether the deceased, at the time of the execution of the said will, knew and approved of the contents of the residuary clause thereof?"

The cause came on for trial at Appleby, on the above issues, before Mr. Justice Mellor and a special jury. It was not contested that the will was duly signed in the presence of two witnesses, as required by the statute; the other points were contested.

It appeared in evidence that for some months the testator had resided at Appleby, paying little or no attention to his business, which was that of a silk merchant at Manchester. Charles Batty Andrew had acted as his manager in that business, and in May, 1870, had entered into negotiations with him for the purchase of the business. With a view to these negotiations, Andrew had gone to Appleby, and on the 28th of May an agreement, without any intervention of a solicitor to represent the testator, was drawn up between them. On the 30th of May Wilson went to visit the testator, at whose instance and on whose behalf was one of the questions of fact discussed in the cause.

It appeared that two sets of instructions had been given for the will, and they were put in evidence.

The instructions for the will given on the 30th of May, 1870, were sent by Thomas Wilson to his brother William Wilson, a solicitor, and were, so far as material in this case, in this form: "My freehold estate of Sandford to my nephew Wm. Fulton on his attaining twenty-one, and if he should die under that age, to go to my nearest heir, Anthony Harrison. To my two nieces, Isabella and Margaret Fulton, £1,000 each (and rest of family portraits) when they attain twenty-one; to be invested in the meantime by the trustees. To Hannah Turner, £200 free of legacy duty. To C. B. Andrew, £1,000. To Tom Wilson, £100 legacy. To Charles Home Lloyd Fitzwilliam, &c., the ancient portraits of the Braithwaite family, and one silver spoon with 'greyhound' thereon; and sea chest. Natural History collection (the whole) to be sold, and also the books on the subject. To Sarah Richardson, the 'Sermon on the Mount.' Miss Fawcett (Warcop), the Book of Psalms—'Victoria Psalter.' Archdeacon Boutflower, the New Testament with engrav-

1875

Fulton v. Andrew.

452] ings. C. B. Andrew and Thomas Wilson *executors and trustees for the children. Residue to executors. Mrs. Harrison, Richmond, £100."

The instructions for the will, dated the 9th of June, 1870, were (so far as material to this case), in these terms: "Freehold estate at Sandford to his nephew Wm. Fulton, but if he should die under that age, to his cousin Anthony Harrison." To his nieces Isabella and Margaret, £1,000 each. "To friend Charles Batty Andrew, £1,000. To friend Thomas Wilson, £100. To Hannah Turner, housekeeper, £200 net. . . . To friend Sarah Richardson, illuminated book, the 'Sermon on the Mount.' Miss Fawcett (Warcop) the Book of Psalms, or what is designated the 'Victoria Psalter.' Ven. Archdeacon Boutflower, the New Testament, with engravings. To children of my late sister Isabella B. Fulton, the rest of the family pictures. Residue to executors (and trustees for the children) the said C. B. Andrew and Thomas Wilson."

The will as executed was in the handwriting of Thomas Wilson. It was alleged by Andrew and Wilson that the will was read over to the testator, and left with him until the morning of the 11th of June. The will exhibiting the discrepancies already set forth between itself and the instructions, examination was directed to this subject, and it was admitted that the testator's attention was not, at the moment of its execution, drawn to these discrepancies. Witnesses were called to show that, at the time of executing the will the testator was not in such a state of mind as to be competent to transact business or to understand the disposition of property he was then authenticating. Other witnesses however deposed, that though he was very weak in bodily health, he was quite of sufficient mental capacity to dispose of his property.

The jurors found the first and second issues in the affirmative, the third and fourth issues in the negative, and thus affirmed, so far, the validity of the will. As to the fifth issue, that the deceased knew and approved of the contents of the will at the time of the execution thereof. And, as to the 6th issue, that at the time of the execution of the said will he did not know and approve of the contents of the residuary clause thereof.

The learned judge on these findings directed a verdict to be entered for the plaintiffs (the present respondents) on the first five issues, but for the defendants (the appellants) on the 6th issue.

453] *On the 30th of April, 1872, the plaintiffs obtained

a rule in the Court of Probate calling on the defendants to show cause why the verdict generally should not be set aside and a new trial granted, or why the verdict on the (sixth) issue whether the deceased knew and approved of the contents of the residuary clause in the will propounded, should not be set aside for misdirection.

The grounds of the alleged misdirection were, that the jurors ought to have been told that if they were satisfied that the testator was of sound mind and read the will, or had it read to him, and after that executed it, they were bound to find that he knew and approved of the contents thereof, and of the residuary clause; that the learned judge had told them that they were to take into consideration the discrepancies between the instructions for the will and the will itself, and, having done so, to determine whether the testator had known and understood the residuary clause; but that the learned judge ought to have told the jurors that in deciding upon the sixth issue they ought to consider simply whether the testator at the time of executing his will was unconscious of, and did not approve of, the residuary clause, owing to the mental prostration referred to in the particulars as intended to be set up under the fifth and sixth issues. The plaintiffs also contended that the verdict on the sixth issue was against the weight of the evidence, and that the verdict on that issue ought to be set aside on the ground that the findings on the other issues really decided that one in favor of the plaintiffs.

The judge of the Probate Court, on the 18th of June, 1872, made the rule absolute to enter the verdict for the plaintiffs, and pronounced for the force and validity of the will of Hugh Harrison, and of which probate was granted in August, 1870, and directed that probate should be given out to the plaintiffs, the executors named in the will.

This was an appeal against that decision (').

Mr. *Herschell*, Q.C., and Mr. *John Edwards*, Q.C., for the appellants: The judgment here was not justified by the verdict. If the *judge of the Probate Court was [454] dissatisfied with that verdict, he ought to have directed a new trial; he had no power to enter a judgment in direct opposition to it. He had been asked for a new trial, but, instead of granting one, he gave a judgment in opposition to the verdict. He could not thus overrule and reverse the finding of a jury on a question of fact. The main issues were the fifth and sixth. The jurors found

(') At the desire of their Lordships the notes of the trial, which were not set out in the printed cases, were furnished to them.

1875

Fulton v. Andrew.

as to the fifth that the testator knew and approved the contents of the will generally. But on the sixth they found specially that he did not know and approve of the residuary clause. The former of these findings by no means included the latter; they were entirely distinct from each other. Yet the finding on the sixth issue has been overruled by the judge of the Probate Court, who has granted probate of the whole will, including the residuary clause. This decision cannot be sustained. The particulars gave notice that the knowledge and approval of the residuary clause was to be a substantive matter of contest. That matter was decided by the jury in favor of the appellants. The findings were sufficient to have prevented the grant of the probate as to that clause; for though when a will has been read over to a man who is competent to make a will, and he executes it, the general presumption is that it is his will, still, where there is a distinct question for a jury on a positive and definite issue, and there is a positive finding on that issue, and no new trial is granted, the judgment must be according to the finding. There was no necessity to grant probate of the whole will, or to refuse probate altogether. In *Allen v. McPherson* (*) it was held that probate might be granted as to one part of a will and might be refused as to another part. *Guardhouse v. Blackburn* (*); *Harter v. Harter* (*), *Williams on Executors* (*), *Barry v. Butlin* (*), and *Mitchell v. Thomas* (*), were also referred to and commented on.

The Solicitor-General (Sir *John Holker*, Q.C.), and Mr. *Fooks*, Q.C., for the respondent:

The evidence here fully warranted the judge of the Probate Court in granting probate of the whole will, and he had a right to exercise his judgment upon that evidence. The particulars furnished under the rule of court raised the question distinctly whether the testator at the time he executed the will was of sound mind, memory and understanding. That question was expressly found in the affirmative. The next question was whether he was conscious of and approved the contents of the will. That again was found in the affirmative. These findings established the will. It was not competent after them for the defendants to go into other questions. The particulars really restricted the case to the incompetency of the testator, brought on by habitual drunkenness and disease of the brain; and when it was distinctly

(*) 1 H. L. C., 191.

(*) Law Rep., 1 P. & M., 109.

(*) Law Rep., 3 P. & M., 11.

(*) Vol. i., p. 238.

(*) 2 Moo. P. C., 480.

(*) 6 Moo. P. C., 137.

found that he was not in that condition, but that he was of sound mind, memory, and understanding, there was an end of the case. Besides, there was an express finding of the testator's approval of the will, and there was no plea raising distinctly the question of his non-approval of the residuary clause on any other ground than that specially set forth in the particulars. This was a fatal objection to the finding on the sixth issue. The testator knew and approved of the contents of the will, and the finding that he did so included, of course, the residuary clause. There ought not to have been any question submitted to the jury on that clause alone; it was included in the general finding on the whole will. To make it a separate and distinct subject of inquiry, and upon any other ground than that of mental prostration, as described in the particulars, was a misdirection, and the finding itself upon it, coming after the finding on the fifth issue, was contradictory and insensible. It was therefore rightly disregarded in the court below, and treated by that court as a nullity. No one could doubt that the testator knew and approved of the executors, and their appointment and the gift of the residue formed but one sentence. He approved of the whole will, and did so after having it read over to him; and, after having had it in his custody for a night, he executed it. Having performed that undoubted act of approval, of the whole, it could not be allowed to any one to select a particular part as an exception to his general approval. The will as it stood was in all respects his real will, and it would be mischievous in the extreme to enter into speculations as to whether the whole *or any part of a particular sentence in it was under- [456 stood and adopted by the testator. In *Atter v. Atkinson* (') that very matter had been attentively considered, and this danger pointed out, and it had been held that if it was proved or admitted that a testator is of sound mind, memory, and understanding, that a will has been read over to him, or that he has read it to himself, and that he has put his signature to it, the question whether he knew and approved of the contents of such will must be answered in the affirmative, and such knowledge and approval will extend to every part of such will. All these matters were established here. *Guardhouse v. Blackburn* ('), and *Harter v. Harter* ('), are to the same effect. In the former the codicil was sustained, though it was sworn by the solicitor who prepared it that words had been inserted without instruc-

(') Law Rep., 1 P. & M., 665.

(') Law Rep., 1 P. & M., 109.

(') Law Rep., 3 P. & M., 11.

1875

Fulton v. Andrew.

tions, and by his inadvertence. In the latter, as here, the question arose on the residuary clause, and though there was evidence that the residuary clause had not been intended to be framed as the will expressed it, yet the will was sustained. That case has never been in any way impugned. Here, too, the evidence was all one way; it all showed that the testator knew and understood the will, and had executed it. The last finding was not justified by any bit of evidence, but must have been a capricious supposition of the jury, and it was therefore properly disregarded.

Mr. *Edwards*, in reply, insisted that the last finding could not be thus overruled, but that, if not made the subject of a new trial, it must be acted upon, and that the general probate ought not to have been granted.

The LORD CHANCELLOR (Lord Cairns): My Lords, this appeal arises out of a proceeding in the Court of Probate, instituted for the purpose of challenging the validity of the will of Hugh Harrison, who died in July, 1870, his will being dated in the previous month of June.

On the examination of the case it appeared to be accompanied by circumstances which certainly were peculiar. 457] For the purpose *of determining the question which had been raised with regard to the validity of the will, certain issues were directed by the Court of Probate, which were tried before Mr. Justice Mellor at the assizes for the county of Westmoreland: [His Lordship read them; see *ante*, p. 450.]

The respondents were the persons propounding the will; they were the two executors named in it, and they were also the residuary devisees and legatees. They were not related in any way to the testator. The jurors upon these issues found the first four in favor of the respondents, that is to say, in favor of the will. They found that the will was duly executed; that the testator was of sound mind, memory, and understanding, and that neither the will nor the residuary clause was procured by the exercise of undue influence. Then, with regard to the other two issues, the fifth and sixth, they found that he knew and approved of the contents of the will with the exception of the residuary clause, but that as to the residuary clause, he did not know or approve of its contents.

I may point out to your Lordships that the Court of Probate having decided in the first instance that this was a case in which it was proper to take the opinion of a jury with regard to the residuary clause, as distinct from the rest of the will, and the jury having found that the testator did not

know or approve of the contents of the residuary clause, it is clear that the mode of ascertaining that question of fact, which had been adopted by the Court of Probate, was satisfied. The verdict of the jury was returned, and that verdict must stand unless it could be set aside upon a ground which must have gone to the fact that improper evidence had been received, or that proper evidence had been excluded, or that the verdict of the jury was against the evidence, or lastly, that the learned judge had misdirected the jury. Upon any one of those grounds the finding might have been challenged, and a new trial directed; but no qualification of the finding having been made at the trial, no leave to take any other course having been reserved, or, indeed, having been asked for, it became quite impossible in this state of things to change the verdict found by the jury against the residuary clause, into a verdict sustaining the residuary clause.

A motion was made by the respondents in the Court of Probate, *the words of which I will read: [His Lord- [458 ship read them, see *ante*, p. 453.] A notice was given for a rule *nisi*, branching into two directions, the one to enter the verdict in favor of those who propounded the will, the other for a new trial. My Lords, that having come before the learned judge, I find that an order was made—a rule *nisi* was granted: the learned judge having read this notice of motion “and heard counsel,” “ordered that the plaintiffs do, on the first day appointed for hearing motions in this court in Trinity Term, show cause to the satisfaction of the court why the verdict of the jury empanelled to try the issues raised by the pleadings in this cause should not be set aside, and a new trial granted thereof, or why the verdict of the said jury on the issue, whether the deceased in this cause knew and approved of the contents of the residuary clause in the said will propounded, should not be set aside for misdirection.” The rule to be applied for, therefore, having gone to the entering a verdict against the verdict of the jury, the rule *nisi* which was really granted does not adopt that form, but is granted merely to show cause why there should not be a new trial, either, as I read, upon the ground of the verdict being against evidence, for that, I take it, must be the meaning of the first part of the rule, or, secondly, upon the ground of misdirection.

My Lords, I will not pause at this moment farther to consider what was said on the argument of that rule, but the result was that this order of the Court of Probate was made, which is now under appeal before your Lordships. “The judge having heard counsel on behalf of the defendants and

1875

Fulton v. Andrew.

plaintiffs, made the rule absolute to enter a verdict for the plaintiffs"—though the rule had not been granted for any such purpose—"and pronounced for the force and validity of the last will and testament of Hugh Harrison, the deceased in this cause, bearing date the 11th day of June, 1870, and of which probate was granted in the month of August, 1870, and made no order as to costs, and directed that probate should be given out to the executors."

I own, my Lords, that I have great difficulty in understanding how this order came to be made. It appears to me to have been made under some forgetfulness or misapprehension as to what was the purpose for which the rule *nisi* had been granted. Certainly even if the learned judge of 459] the Probate Court had been satisfied *that there was a verdict against evidence, or a misdirection on the part of the judge at the trial, either of those considerations ought to have resulted in an order for a new trial, and not in the entering of a verdict for the plaintiffs. In point of form, therefore, I should submit to your Lordships that it would be impossible to maintain this order.

But then arises the question, What course ought now to be taken by your Lordships? And I apprehend that you will ask yourselves the question, supposing you had been sitting upon the argument of this rule, what opinion would you have arrived at with regard to the allegation that there was here a verdict which was against evidence, or that there was here a verdict which had been obtained after a direction given by the judge at the trial which was erroneous in point of law. I certainly found myself, and think that your Lordships would have found yourselves, under some difficulty in dealing with that question, having regard to the fact that there was not submitted to your Lordships upon the papers before you, any note of the direction of that learned judge, or of the summing-up of the evidence given before him. The parties, however, were permitted by your Lordships to supply a copy of the shorthand writer's notes of what passed at the trial, and those notes have been considered, I think, by all your Lordships.

My Lords, looking at the shorthand writer's notes of what took place at the trial, which I have read with great care, it appears to me that nothing whatever fell from the learned judge on the occasion of the trial which could be said to amount to a misdirection to the jury upon any question of law. I find that he, with great care, went through the whole of the evidence. He pointed out to the jury what had been deposed to in the evidence, and pointed out what had been

the arguments of the learned counsel on each side. He remarked upon these matters connected with the making of this will, and connected with the instructions which had been given for the will, upon two different occasions—upon the form which those instructions had assumed—upon the circumstance that one of the persons propounding the will, one of the residuary legatees, had employed his brother, a solicitor, for the purpose of preparing the will from those instructions. He *remarked upon the variance which [460 occurred between the instructions, which were stated to contain the directions of the testator, and the will as submitted to the testator for execution; and he, having directed the attention of the jurymen to all these matters, and pointed out to them that the Court of Probate desired to hear from them their opinion as to the consciousness of the testator with regard to the contents of the whole of the will, and also, separately, their opinion as to the consciousness of the testator with regard to the contents of the residuary clause, the jury returned the verdict to which I have already referred. I should be of opinion that in all that was there done there was nothing which could be called misdirection in the proper sense of that term.

But, my Lords, it appears to have been argued in the Court of Probate, and it was argued very strongly at your Lordships' bar, that there occurred at the trial a misapprehension on the part of the learned judge as to what was stated to be an absolute and fixed rule of law; and that, because the learned judge had not laid down before the jury that absolute and fixed rule of law with regard to the judging of the validity of a will, there was a species of non-direction on the part of the learned judge which amounted to misdirection; or that, if that was not so, still that there was a finding of the jury in the face of evidence which ought to have led to a different conclusion.

Now, my Lords, the rule of law which is said not to have been sufficiently considered is this: It is said that it has been established by certain cases to which I will presently refer, that in judging of the validity of a will or of part of a will, if you find that the testator was of sound mind, memory, and understanding, and if you find, farther, that the will was read over to him, or read over by him, there is an end of the case; that you must at once assume that he was aware of the contents of the will, and that there is a positive and unyielding rule of law that no evidence against that presumption can be received. My Lords, I should in this case, as indeed in all other cases, greatly deprecate the in-

1875

Fulton v. Andrew.

troductio or creatio of fixed and unyielding rules of law which are not imposed by act of Parliament. I think it would be greatly to be deprecated that any positive rule as 461] to dealing *with a question of fact should be laid down, and laid down now for the first time, unless the Legislature has, in the shape of an act of Parliament, distinctly imposed that rule.

But, now, let us see what is the authority for the imposition of such a fixed and unyielding rule of law. Before looking at the two cases which were cited, I will take the liberty of reminding your Lordships of the law which has been laid down in general terms as to the mode of dealing with testamentary instruments like the present, where persons who are strangers to the testator, and who themselves have obtained or conducted the making of the will, are the persons benefiting by the will. In the well-known case of *Barry v. Butlin*, before the Judicial Committee of the Privy Council, Mr. Baron Parke, delivering the opinion of the Judicial Committee said this⁽¹⁾: "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: the first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. These principles, to the extent that I have stated, are well established. The former is undisputed. The latter is laid down by Sir John Nicholl in substance in *Paske v. Ollatt*⁽²⁾, *Ingram v. Wyatt*⁽³⁾, and *Billinghurst v. Vickers*⁽⁴⁾, and it is stated by that very learned and experienced judge to have been handed down to him by his predecessors, and this tribunal has sanctioned and acted upon it in a recent case." That recent case was the case of *Baker v. Batt*⁽⁵⁾.

462] *Now, my Lords, bearing in mind the general prin-

(1) 2 Moo. P. C., 480, 482.

(2) 2 Phillim., 323.

(3) 1 Hagg. Ecc. Rep., 388.

(4) 1 Phillim., 187-193.

(5) 2 Moo. P. C., 317.

ciples there enunciated, let me direct your Lordships' attention to the two cases occurring in the Court of Probate, and heard before the very learned judge from whose decision the present appeal comes, two cases which were referred to in the argument of this case. The one is the case of *Atter v. Atkinson* ⁽¹⁾, in which there is the report of a charge of Lord Penzance to a jury. In that case, the jurors, it appears, were discharged, as they could not agree upon a verdict; but this is the portion of the charge which was referred to. I should state that that was a cause in which, as here, a solicitor who was a stranger to, or at least not a relative of, the testatrix, was named as the residuary legatee under the will; but the execution of the will by the testatrix was performed in the presence of another solicitor. Lord Penzance there addresses the jury in these terms ⁽²⁾: "The question of fact is, did Mrs. Newcombe really ever read the contents of this document? If you are satisfied that she read it, then, as a proposition of law, I feel bound to direct you that she must be taken to have known and approved of its contents. If being of sound mind and capacity, she read this residuary clause, the fact that she afterwards put her signature to it is conclusive to show that she knew and approved of its contents. Reflect on the contrary proposition. Suppose that a long will with a number of complicated arrangements is read to a competent testator, and is executed by him, if we were permitted some time after his death to enter into a discussion as to how far he understood and appreciated the bearings of all the different parts of the will, we should upset half the wills in the country. Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the question whether he knew and approved of the contents is answered."

My Lords, although I do not think it is necessary in the present case to determine the question, I do not know that there is anything in that direction, taken as a whole, to which I could venture to make any objection; but you will observe the very important qualification—I say, "taken as a whole." In the first place the *jury must be satisfied [463 that the will was read over, and in the second place must also be satisfied that there was no fraud in the case. Now, applying those observations to the present case, I will ask your Lordships to observe that we have no means of knowing what was the view which the jury, in the present case, took with regard to the reading over of the will. The only

⁽¹⁾ Law Rep., 1 P. & M., 665.

⁽²⁾ Law Rep., 1 P. & M., 670.

1875

Fulton v. Andrew.

witnesses upon the subject were those witnesses who themselves were propounding the will. No person else was present—no person else knew anything upon the subject. It appears that these witnesses stated either that the will was read over to the testator, or that it had been left with him over-night for the purpose of being read over. The jury may, or may not, have believed that statement, or may have thought, even if there had been some reading of the will, that that reading had not taken place in such a way as to convey to the mind of the testator a due appreciation of the contents and effect of the residuary clause—and it may well be that the jurors, finding a clear expression of the intention of the testator, or what they may have thought to be a clear expression of the intention of the testator, in the instructions for the will, were not satisfied that there was any such proper reading or explanation of the will as would apprise the testator of the change, if there was a change, between the instructions and the will.

But, my Lords, moreover, how does the qualification that there must be no fraud bear upon the present case? It is very difficult to define the various grades or shades of fraud; but it is a very important qualification to engraft upon the general state of things, that the reading over of a will to a competent testator must be taken to have apprised him of the contents. If your Lordships find a case in which persons who are strangers to the testator, who have no claim upon his bounty, have themselves prepared, for their own benefit, a will disposing in their favor of a large portion of the property of the testator; and if you submit that case to a jury, it may well be that the jury may consider that there was a want, on the part of those who propounded the will, of the execution of the duty which lay upon them, to bring home to the mind of the testator the effect of his testamentary act; and that that failure in performing the duty which lay upon them, amounted to a greater or less degree of 464] fraud on their part. The qualification *of Lord Penzance in the charge I have read may entirely apply to such a case.

The other case which came before the same learned judge is that of *Guardhouse v. Blackburn* ⁽¹⁾. In that case the learned judge laid down certain propositions which he said commended themselves to his mind as rules which since the statute ought to govern his action in respect of a duly executed paper; and the statement of those rules was this ⁽²⁾: “Thirdly, although the testator knew and approved the

⁽¹⁾ Law Rep., 1 P. & M., 109.

⁽²⁾ Law Rep., 1 P. & M., 116.

contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that, subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof."

Therefore, my Lords, I come to the conclusion that, even if these rules, laid down in this way by Lord Penzance, are to be accepted as rules which should be applied to the case of every testamentary instrument, still, with regard to the present case, they do not carry to my mind any persuasion that there was a non-direction, on the part of the learned judge who tried the cause, in a matter which he ought to have laid before the jury. It appears to me that, consistently with the rules mentioned by Lord Penzance, the jurors here may not have been satisfied that there was a proper reading of the will to the testator, or may have been satisfied, after hearing all the facts submitted to them by Mr. Justice Mellor, that there was on the part of those who propounded the will such a dereliction of duty, such a failure of duty on their part, as amounted to that degree of fraud to which Lord Penzance refers in the rules I have mentioned.

My Lords, I therefore arrive at the conclusion that there was no positive misdirection on the part of Mr. Justice Mellor. I arrive *at the conclusion that there was no fail- [465
ure on his part by reason of his not laying down some unyielding and absolute rule of law such as was suggested at the bar; and I also arrive at the conclusion that there was no finding of the jury which could be called a finding in opposition to evidence; for it was suggested that it might be viewed in that light. It was suggested that, when once the jurors had before them uncontroverted evidence that the will was read over to the testator, any verdict on their part that the residuary clause was not known to the testator would be opposed to their finding upon the issue that he was of sound and disposing mind. I say that that again was a question for the jurymen, and it might well be that they would not believe the evidence with regard to the read-

1875

Fulton v. Andrew.

ing over of the will. Upon these grounds, endeavoring to place myself in the position in which the Court of Probate was placed when it had to deal with this rule *nisi*, I feel myself obliged to say that there was nothing which could be alleged against this verdict of the jury which required the court to direct a new trial. It was eminently a question for the jury, and I see no reason whatever to be dissatisfied with the verdict.

I will only refer to one other subject which has been very much argued before your Lordships, and I refer to it lest it should appear to have escaped observation. It was said that there was a general rule in the Probate Court which had not been complied with in this case, and that evidence was allowed to be adduced at the trial, which, having regard to that rule, ought not to have been laid before or considered by the jury. My Lords, that rule and the particulars were in these words: [His Lordship read them; see *ante*, p. 450.] It was said that these particulars must be read as if the second part was intended to be exactly coextensive with the first—that the only allegation in the particulars was an allegation of mental prostration brought on by habitual drunkenness and disease of the brain, that the words “and that he was not in fact” “conscious of and did not approve of the contents” of the will, must be referred to that state of mind and body, and that unless that state of mind and body was established, the case suggested by the particulars could not be held to have been proved.

My Lords, I do not in the first place read the particulars in that way. It appears to me that it would be much too strict a *construction to put upon them to hold that the two portions of that clause are identical. But, farther, I have not satisfied my mind that the rule in question applies at all to an issue like the sixth. The rule expressly, on the face of it, applies only to the first five pleas or issues; they are set out upon the face of the rule, and it is said that, with regard to those issues, particulars must be delivered, and evidence of the kind I have mentioned must be given. With regard to this pleading, the sixth issue in this case was on a plea pleaded by special leave of the court, and I do not find that any terms whatever were imposed with regard to the particulars to be given under that plea.

But, in addition to that, I will ask your Lordships' attention to this circumstance. It appears to me impossible that any person reading those particulars could have supposed that they applied to the sixth issue as well as to the fifth; because, if you hold that the particulars apply to both issues,

and are to be construed as the respondents construe them, the consequence would be this—the particulars would amount to a suggestion that the testator was in a state of mental prostration brought on by habitual drunkenness and disease of the brain, so that he could not be conscious of, or approve of, the contents of the whole will, but that still, that disease and prostration may have been of so singular a kind, that he could approve of the contents of the whole will *minus* the residuary clause, but could not approve of the contents of the residuary clause. My Lords, that would be reducing the meaning of the particulars to an absurdity, and I think they could not have been so treated or understood by any person who read them.

But, my Lords, I am not satisfied that there is anything in the rule which gives the particulars the effect contended for; and bearing in mind especially, that no objection whatever was taken at the trial in this case, when some amendment might have been permitted, this point cannot now be taken with success at your Lordships' bar.

The result of the whole is this: I move your Lordships to allow the present appeal, and, making now the order which ought to have been made in the Court of Probate, to discharge with costs the rule obtained for a new trial; to reverse the order of the Court of Probate giving out probate of the whole will, and, with that *direction remit to [467 the Court of Probate to do what is right with regard to qualified probate of this will.

LORD CHELMSFORD: My Lords, I agree entirely with my noble and learned friend.

The judge of the Probate Court having sent down certain issues to be tried by a jury, and the jury having returned a distinct finding upon each issue, it was not in his power afterwards to change that verdict into a different one. If there had been liberty reserved at the trial for the party against whom the verdict upon the sixth issue had been pronounced, to move the court to alter that verdict, and to change it into a verdict for him, that undoubtedly would have given the judge power so to alter the verdict. But no such leave was reserved, and no rule to that effect was granted by the learned judge. The notice of the application proposed on the part of the plaintiffs was, first of all, that probate of the will should be delivered out notwithstanding the finding upon the sixth issue; or secondly, for a rule to show cause why a new trial should not be granted upon the ground that the verdict was against the weight of the evidence, and for misdirection. But what was the rule

1875

Fulton v. Andrew.

which was granted after that notice? The rule called on the defendants to show cause why the verdict of the jury empanelled to try the issues raised by the pleadings in this cause should not be set aside, and a new trial granted thereof, or why the verdict of the said jury on the issue whether the deceased in this cause knew and approved of the contents of the residuary clause in the said will propounded should not be set aside by reason of misdirection. That is as I read this rule, upon each question, that the verdict generally of the jury should be set aside, or the verdict of the jury upon the sixth issue should be set aside upon the ground of misdirection. Therefore the only question which the learned judge had to decide upon the rule which he himself had granted, was, whether a new trial ought to be had generally, or whether it ought to be had, specially, as to the sixth finding, upon the ground of misdirection. Instead of adopting the proper course the learned judge, certainly in the most extraordinary way, there being no liberty reserved 468] to enter a different verdict from that which had been found by the jury, took upon himself to decide that which the jury alone had a right to decide, and ordered that a different verdict should be entered.

Now it being perfectly clear that that order cannot be maintained, the only question before your Lordships really was, or ought to have been, whether a new trial should have been granted on the ground of misdirection. Unfortunately we had not the assistance we ought to have had upon this question. What we might have expected would have been that the learned counsel should have shown us in what respect the summing-up of the learned judge amounted to a misdirection. Nothing of that kind was pointed out to us, but we had the great advantage of seeing the shorthand writer's notes of the summing-up, and it was left to us to find our way through that summing-up for the purpose of ascertaining whether there was any misdirection or not. I have read every part of the summing-up of the learned judge which related to the particular issue in question, and I agree entirely with my noble and learned friend that there is nothing on which we can found any opinion that there has been a misdirection; nor do I find that there was any inflexible rule upon the subject of the validity of a will which the learned judge omitted to present to the jury.

My noble and learned friend has gone so much at length into the question of non-direction that I will merely say that I entirely agree with him that there is neither misdirection nor non-direction in the present case; and therefore, as the

order of the learned judge of the Probate Court cannot stand, and as there is no possibility of sending the case to a new trial upon the ground of misdirection on the part of Mr. Justice Mellor, I think the course suggested by my noble and learned friend is the proper one for your Lordships to adopt.

LORD HATHERLEY: My Lords, I entirely concur with the observations which have already been made upon the subject of this will, and I have but very few observations to make in addition.

A matter which appears to me deserving of some remark, and *upon which the Lord Chancellor has already [469 fully commented, is the supposed existence of a rigid rule, by which, when you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed it, all farther inquiry is shut out. No doubt those circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator; still circumstances may exist which may require that something farther shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory, and also having had read over to him that which had been prepared for him, and which he executed as his will. It is impossible, as it appears to me, in the cases where the ingredient of fraud enters, to lay down any clear and unyielding rule like this. One is strongly impressed with the consideration that, according to the natural habits and conduct of men in general, if a man signs any instrument, he being competent to understand that instrument, and having had it read over to him, there is a very strong presumption that it has been duly executed, and that very strong evidence is required in opposition to it in order to set aside any instrument so executed.

Now, my Lords, laying down, for my own part, no general rule of any description whatever, which I carefully avoid doing with reference to cases of this description, I desire to call your Lordships' attention for a moment to the position in which the matter stood before the jury upon the issues directed. The case was one in which the other parts of the will were of a very ordinary character, consisting of dispositions and bequests to the testator's relatives and friends. But when you come to the gift of the residue, you find that that gift is made to two persons who had no such special claim upon the testator's bounty. You find an issue directed to that state of things, and farther directed to this,

1875

Fulton v. Andrew.

that the will had undoubtedly, and *ex concessis*, been framed through the agency of those who took this benefit in the residue ; that is to say, that one person who took the benefit in the residue, and who, with his co-residuary legatee, alone supported the case of the will having been read to the testator, that one person called in another *person, who was the other residuary legatee, and who had once been in the testator's service to the extent of writing a few letters for him, but was then acting as a solicitor's clerk in a neighboring town. The person so called in took down the instructions, and when that had been done, neither of the residuary legatees thought fit to send those instructions to the testator's ordinary solicitor, and consequently the testator had not the protection which a man receives from the solicitor whom he has been in the habit of employing, but the instructions were sent to a brother of one of the residuary legatees, who himself was practising as a solicitor.

There were other grave circumstances attending the transaction. Any one reading over those instructions, which were given on two separate days, namely, the 30th of May and the 9th of June, will see some very remarkable circumstances attending the gift to the residuary legatees. In the first set of instructions, which were given on the 30th of May, after giving to his nieces Isabella and Margaret Fulton £1,000 each (with certain family portraits), when they attained the age of twenty-one, the money to be invested in the meantime by the trustees ; when he arrives towards the end of such dispositions, there is a gift of a New Testament to a certain Archdeacon Boutflower, and then you come to these words: "C. B. Andrew and Thomas Wilson, executors and trustees for the children. Residue to executors." That is the first set of instructions, and certainly upon those instructions it would be open at all events to question (it is not necessary to say a word more than that) whether or not the residue was not given to them as trustees for the children. Then, when you come to the set of instructions given on the 9th of June, you find that the bequest is this—it is a little varied—"Residue to executors (and trustees for the children), the said C. B. Andrew and Thomas Wilson." The same remark would apply exactly to that form of instructions. Then there is a curious note in the margin, we were told that these notes were prepared by the solicitor, "Trustees for children not necessary. Father is their guardian." Certainly that is, to say the least of it, under the circumstances, a somewhat suspicious note. It is suggested that trustees are unnecessary because the father of the nieces is

their guardian. That is a singular reason to give—*perhaps it might be the very reason why trustees [471] might be necessary to protect them against unwise paternal influences. And, finally, the will in the residuary clause leaves out the word “trustees,” and simply gives the residue to the executors.

It is impossible to say that there was not a grave case to try, and what is more, the court thought so. The court thought fit to direct issues as to the whole will and as to the residuary clause. It was necessary, therefore, for the jurors to come to a conclusion as to whether they were satisfied that the testator knew what he was doing with regard to the whole will; and if they thought he did not know what he was doing as to the whole will, whether they were satisfied that he knew what he was doing, or what he is alleged to have done, with reference to the residuary clause. As the learned judge said at the trial, this is not a usual or common issue, but the circumstances of the case required it. The learned judge from whom this appeal comes, had himself directed the issue in that form; and there are cases, which it is not necessary to cite, where one portion of a will has been established while another portion of that same will has been rejected.

That being the case, my Lords, it would appear to me, I confess that there was not that inconsistency in the findings, which the learned Judge Ordinary seems to have thought there was, when the case came back to him. The jurors found that they were satisfied that the testator was not a person of the description alleged by the present appellants, namely, a person of intemperate habits, which had deprived him of his mind and understanding. They found that they were satisfied on that point, and that they were satisfied also that he had properly executed the will, with a knowledge of its contents, except as regards the residuary clause; they found as to the residuary clause, that it was not so. Now, they had to be satisfied of that. There is one rule which has always been laid down by the courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, as these two persons undoubtedly were, and who obtains a bounty of that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough *in their case that the will was read over to the testa- [472] tor and that he was of sound mind and memory, and capable of comprehending it. But there is a farther onus upon

those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of showing the righteousness of the transaction. Now, how did these persons discharge this onus in the present case? They only discharged it by themselves giving evidence before the jury of the reading over of the will, and they were the only persons who did give that evidence. It would not have been difficult for them to have had other persons present when the reading over of the will took place; but that does not appear to have been done.

With all these circumstances attached to the will, it does appear to me, my Lords, that it was perfectly competent for the jurors, regard being had to all the circumstances of this case, to say, we are satisfied that the testator was in a condition to make such a disposition as he has made with reference to his friends and relatives, but we are not satisfied, having only the evidence of the persons interested, that the effect of the clause with regard to the gift of the residue was made clear to him, especially when we find instructions existing which, at least, admit of a contrary interpretation, treating those who are to take the residue as mere trustees; finding those instructions existing, when we find a clear, absolute and express gift to those persons in the residuary clause of the will, we are not satisfied that the testator was made to see the distinction, or to observe the difference between the instructions and the will.

My Lords, I have looked over the learned judge's directions, and I ask the question, has the learned judge either given to the jury any direction which in point of law he ought not to have given, or has he withheld from the jury any direction which he ought to have given? I find that that the learned judge has, in as strong language as any that I could use, and no doubt in much better language, expressed to the jurors the great caution they should exercise in coming to a conclusion adverse to a will which a person of sound mind, memory and understanding has executed after having had it read over to him. On the other hand, 473] the learned *judge has pointed out, as he was bound, as it appears to me, to do, that their attention should be carefully directed to the question, whether or not, regard being had to the peculiar circumstances of this particular gift, regard being had to the instructions emanating from those persons who are to have the benefit of the gift, and regard being had to the amount of evidence put before them as to the reading of it over to the testator, the difference between the instructions and the form of the will had been made clear to

his mind. The learned judge places all these, among other things, before the jury, but leaves the question entirely for the jury to determine. It appears to me, that from the beginning to the end every single question which ought properly to have been submitted to the jury, was present to the mind of the learned judge, and was conveyed by him to the minds of the jurymen; and I cannot, myself, see any single point in which he has erred by omitting to direct their attention to any circumstances which in this peculiar case required notice.

The case is a singular one in its character, and without wishing to shake the force of the observations made by the learned judge of the Probate Court, as to the danger (which is a real danger) of holding that any man of sound mind who has put his hand to an instrument after having had that instrument read over to him, can have meant otherwise than what he said; admitting all that, yet I do say that at least the jury should be satisfied that it was read over to him, and not only that it was read over to him, but that it was read over in such a manner as that the discrepancy between the instructions and the will was brought before the consideration of the testator. It appears to me that in this case there is nothing to induce us to say that the jurors were not warranted in their conclusion.

My Lords, upon the question of form, though it is something more than form, it is to a certain degree a question of substance, the order which has been made by the learned judge in the court below (I think it must have been by some accident, probably his attention was not called to the circumstance) is utterly inconsistent with the rule against which the plaintiffs had to show cause. It is impossible for us to maintain that order, and having regard to *all the cir- [474] cumstances of the case I entirely agree in the motion that has been made to your Lordships by the Lord Chancellor.

LORD O'HAGAN: My Lords, I am entirely of the same opinion, and any observations which I had thought of submitting to your Lordships have been largely anticipated, especially by my noble and learned friend on the woolsack: It appears to me that the judgment now under consideration of your Lordships is unmaintainable, either in form or in substance.

It is a judgment which not only ignores, but purports to reverse, a finding of a jury. It affects to enter up a verdict in opposition to their verdict, there being no leave reserved to enter it up, nor any consent of parties for that purpose. And this is done on a conditional order, which goes merely for a new trial. I think that the order subsequently made to enter a verdict for the plaintiffs, pronouncing for the va-

1875

Fulton v. Andrew.

lidity of the will of which probate was granted in August, 1870, and directing that probate should be given to the executors, is wholly without authority or precedent. The ultimate decision dealt with the matter as if both branches of an alternative rule, to set aside a verdict, or to enter up judgment notwithstanding a verdict, had been left open. This appears to me to have been, according to the practice with which we have been heretofore familiar, a manifest irregularity, and, upon that ground, I am quite of opinion with the noble and learned Lords who have already addressed the House, that the judgment cannot stand.

Upon the matter of substance I, also, have had the advantage of looking over the notes of the charge of the learned judge, and I have failed to discover any misdirection in the course of that charge. The learned judge appears to me, in the clearest and fairest way, to have submitted to the jury all the facts of the case in their proper relation to the issues which he also clearly explained. The jurors had to consider a question which was especially one for their consideration, and they only were competent to decide it. They had to decide as to the credibility of the only witnesses who spoke 475] to the material facts which have *been assumed as the foundation of the ruling of the learned judge. The witnesses who spoke to those facts were only two in number, and they may have been impeachable in various ways, as to character, manner, and demeanor, and other considerations which may be taken into account by a jury in estimating the value and sufficiency of evidence. They both had the deepest interest in the result, and the question was whether their evidence was satisfactory on those points which the learned judge assumes to have been conclusively demonstrated.

My Lords, in this state of things, without giving any absolute opinion upon the principle enunciated in those cases which have been referred to by my noble and learned friend the Lord Chancellor, *Guardhouse v. Blackburn* (') and *Atter v. Atkinson* (*), and deciding whether or no you should make a rigid rule as to the assumption from certain facts that there must be a certain result in law, it appears to me that in this particular case the principle, good or bad, does not apply at all. The condition of applying such a principle must be the ascertainment either of uncontradicted facts, or of facts so proved as to be beyond all controversy. In this case it is impossible to say that that is so. It is impossible to say that there was not a most serious question of fact for

(') Law Rep., 1 P. & M., 109.

(*) Law Rep., 1 P. & M., 665.

the jury to determine, and, that being so, it appears to me, my Lords, that the learned judge not only did not do wrong in refusing to bind the consciences of the jury by a strict conclusion of law, but that he would have done wrong if he had attempted to do any such thing. It appears to me that a direction, such as has been contended for at the bar of your Lordships' House, to the jury to find in a particular way would have really amounted to a misdirection.

Therefore, my Lords, upon the whole, whether I look to the form of the judgment, the grounds on which it has been pronounced, the circumstances which anteceded it, or the substance of it in relation to the conduct of the case before the learned judge in the court below, I think that is not maintainable, that the suggestion which has been made by my noble and learned friend on the *woolsack should [476 be adopted, and that the verdict is pronounced by the jury ought to stand.

The following order was made :

It is ordered, That the order of the Court of Probate of the 18th of June, 1872, complained of, be reversed; and that the rule nisi granted by the said court for a new trial be discharged with costs: And that the cause be remitted back to the said Court of Probate, with directions to make such farther order as to recalling probate of the will of Hugh Harrison, granted on the 19th of August, 1870, and granting fresh probate of the said will, omitting the residuary clause, as may be right.

Lords' Journals, 16th February, 1875.

Solicitor for the appellants : *J. Whitehouse.*

Solicitors for the respondents : *Hughes & Son.*

See 2 Eng. Rep., 304 note ; 4 Eng. Rep., 710 note.

A deed obtained without adequate consideration by imposition upon an imbecile old man will be set aside : *Blackford v. Christian*, 1 Knapp P. C., 73 ; *Deene v. Phillips*, 5 West Virginia, 168 ; *King v. Anderson*, Irish Rep., 8 Eq., 625, reversing S. C. Id., 147 ; *Wartemberg v. Spiegel*, 31 Michigan, 400.

But the inadequacy must be gross and such as to shock the conscience and confound the judgment of any man of common sense : *Weist v. Garman*, 4 Houston (Del.), 125 ; *Roger v. Ochtree*, 4 Houston (Del.), 452 ; *Phillips v. Stew-*

art, 59 Missouri, 491 ; *Ames v. Gilmore*, 59 Missouri, 538 ; *Butler v. Miller*, Irish Rep., 1 Eq., 210.

A degree of weakness of mind, far below what may be necessary to justify a commission of lunacy, if it has been taken advantage of to obtain the execution of a deed, will be sufficient ground for setting that deed aside : *Blackford v. Christian*, 1 Knapp P. C., 73 ; 1 Story's Eq. Jur., §§ 234-239 ; *Eaton v. Eaton*, 37 New Jersey Law Rep., 109 ; *Butler v. Miller*, Irish Rep., 1 Eq., 210 ; *King v. Anderson*, Irish Rep., 8 Eq., 625, reversing S. C., Id., 147.

Where the issue was whether a grant-

1875

Fulton v. Andrew.

or was of sound mind or not when he executed the conveyance, and as to what constituted such unsoundness of mind as would avoid the deed *at law*, the court charged the jury that the person executing such a deed, must be incapable of understanding and acting in the ordinary affairs of life, that it was not necessary that he should be without any glimmering of reason, and that as one test of such incapacity the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question when its general purport was read over to him; held correct: *Ball v. Mannier*, 3 Bligh, N. S., 1; *Eaton v. Eaton*, 37 New Jersey Law Rep., 109.

Where shortly after the death of the testator and rejection of his will and granting of letters of administration to her sons-in-law, his widow, aged 65, executed an instrument by which she gave up some \$25,000, upon a bill filed to set it aside, held that the administrators held a confidential relation to the widow which, according to the policy of the law, forbids that a fiduciary should receive any material gratuity, from one whose interests are entrusted to his care, unless it appears that no undue means or influence were used to induce the gift, and that it was made by the donor voluntarily, and with full knowledge of the nature and extent of the act: *Statham v. Ferguson*, 25 Grattan (Va.), 28.

Upon the evidence the court held that undue influence had been exerted on the widow, and that she was not sufficiently informed of the value of the estate or of her rights; and therefore, although no fraud may have been intended, the deed should be set aside: *Statham v. Ferguson*, 25 Grattan (Va.), 28.

But in order to justify the setting aside of a deed where no undue influence is shown, on the ground of mental incapacity from age, it must be shown that the grantor was affected with such a degree of mental weakness as to render him incapable of understanding and protecting his own interests. The circumstance that his mental powers had been somewhat impaired by age, is not sufficient, if he still retained a full comprehension of the meaning, design and effect of his acts: *Wiley v. Erault*, 66 Illinois, 25; *Lindsey v. Lindsey*, 50 Illinois, 79; *Clearwater v.*

Kimler, 43 Illinois, 272; *Luper v. Taylor*, 47 Alabama, 221; *Bundy v. McKnight*, 48 Indiana, 502.

The fact that the legatee was present when the will was drawn and interfered, and that the scrivener was told to draw the will as the legatee directed, is evidence of undue influence. A subscribing witness may be asked whether he was not told at the time to refuse to attest the will: *Krepps v. Krepps*, 4 Brewster (Pa.), 38.

As undue influence is a fraud, mere suspicion of it is not enough, but actual proof must be produced: *McClure v. Mansell*, 4 Brewster, 119; *Bundy v. McKnight*, 48 Indiana, 502.

Importunate persuasion from which a delicate mind would shrink will not invalidate a devise. To establish undue influence there must be proof of fraud, threats or misrepresentations, undue flattery or physical or moral coercion, so as to destroy the testator's free agency, operating as a present constraint at the making of the will. Neither general bad treatment nor general kindness is evidence of undue influence, unless shown to be part of a crafty arrangement to procure a will: *Towney v. Long*, 76 Penn. St. R. 106; *Rabb v. Graham*, 43 Indiana, 1; *Bundy v. McKnight*, 48 Indiana, 502.

The natural influence of association and intercourse is not undue influence: *McClure v. Mansell*, 4 Brewster, 119.

Influences that may be fairly and reasonably used, to induce a person to make a will, must be fair and reasonable: *Bundy v. McKnight*, 48 Indiana, 502.

It has been held that if the minister of a church draws a will for a testatrix to whom he stands at the time in the intimate and confidential relation of a spiritual adviser and pastor, under the bequests of which both he and his church take a pecuniary benefit, it will not invalidate the will without proof that she was at the time of doubtful testamentary capacity: *Russell v. Russell's admrs.*, 3 Houston (Del.), 103.

But see 1 Story's Eq. Jur. §§ 307-328; Kerr on Frauds, 192, 1st Am. ed.; *Norton v. Reilly*, 2 Eden, 296; *Huguenin v. Basley*, 14 Vesey, 273; *Middleton v. Sherburn*, 4 Younge & Coll. Exch., 358; *Id.*, 593; *Nottidge v. Prince*, 2 Giffard, 246; *Mutter of Metcalfe*, 2 De Gex, Jones & Smith, 122; *Thompson v. Heffernan*, 4

Drury & Warren, 286; *Whyte v. Meade*, 2 Irish Eq. R. 420.

No legal presumption of undue influence arises from the fact that the testator was on his death bed, and surrounded by certain of his children who are principally benefited by the will, while the plaintiff contesting the will, also a child of the testator, was absent: *Bundy v. McKnight*, 48 Ia., 502.

In order to constitute undue influence it must be such an influence as in some degree destroys the free agency of the testator, and constrains him to do what was against his actual will or intention, and which he was unable to refuse or too weak to resist. It must be such an influence as to deprive the testator of the exercise of his free will: *Marvin v. Marvin*, 5 N. Y. Supreme Court Reports, 429 note, Court of Appeals; S. C., 3 Abb. Court of Appeals Dec., 192; *Gardner v. Gardner*, 34 New York Rep., 155; *Seguin v. Seguin*, 4 Abb. Court Appeals Dec., 191; 3 Keyes, 668; *Nezzen v. Nezzen*, 3 Abb. Court Appeals Dec., 360; *Tawney v. Long*, 76 Penn. St. Rep., 106; *Leeper v. Taylor*, 47 Alabama, 221; *Rabb v. Graham*, 48 Indiana, 1; *Bundy v. McKnight*, 48 Indiana, 502.

Although a will were drawn by the principal beneficiary under it, and the testatrix were able to read writing, and of sufficient capacity to transact business and yet did not read it, it may be inferred, from circumstances, that she was acquainted with the contents of it: *Nezzen v. Nezzen*, 3 Abb. Court Appeals Dec., 360; *Clarke v. Clarke*, Irish Rep., 2 Com. Law, 395.

The party from whom a deed was procured by fraud or undue influence, or the heirs or next of kin of a person induced to execute a will by fraud or undue influence will be barred by laches or unreasonable delay in applying for relief: *Holden v. Meadows*, 81 Wisconsin, 284; *Gould v. Gould*, 3 Story's Rep., 516.

In *Holden v. Meadows*, 81 Wisconsin, 284, a doubt was expressed whether a court of equity could relieve from a will procured by undue influence and whether the remedy was not in the Probate Court by opposing probate of the will: See also 1 Story's Jur., § 184; *Gould v. Gould*, 3 Story's Rep., 516; *Gaines v. Chew*, 2 How. U. S. 619; *Middleton v. Sherburn*, 4 Y. & Coll. Exch., 858, 598.

SCOTCH APPEALS.

[Law Reports, 2 Scotch Appeals, 409.]

March 11, 1875.

409] *THE LORD ADVOCATE, Appellant; and CLYDE STEAM NAVIGATION COMPANY, *et al.*, Respondents.

17 & 18 Vict. c. 104—*Ship Measurement—Awning over Main Deck—Tonnage.*

Where over the main deck of a ship there was a covering or awning open at the sides, and unfit for the carriage of cargo, passengers, or crew, it was *held* by the House, affirming the decision appealed from, that tonnage was not chargeable in respect of such covering or awning as if it were a third deck:

Per THE LORD CHANCELLOR: I am of opinion that the ship in this case has not a third deck, available for cargo, or for the berthing or accommodation of passengers or crew.

Per LORD O'HAGAN: The measurement of the ships tonnage should be in accordance with her carrying capacity.

By the Merchant Shipping Act, 1854 (¹), it is enacted that if a vessel has a third deck, the tonnage between it and the tonnage deck shall be ascertained in the mode prescribed by the statute (4th and 5th sub-divisions of the 21st section).

The Lord Advocate, on behalf of the Board of Trade and the Commissioners of Customs, instituted the present suit in February, 1872, to have it declared that the tonnage of the respondent's steamship the *Bear*, of Glasgow, was erroneously computed at an amount under the proper tonnage thereof as ascertained by the official surveyor.

The condescendence alleged that the vessel was a three-decked ship; the fact, however, being, that she had but two complete decks; and over the main deck, between the raised poop and the raised forecastle, a covering, or awning, termed an upper or third deck, not available for cargo or stores, nor fitted for the berthing or accommodation of passengers or crew, though useful in other respects.

The Clyde Company put in their defence, and the case 410] came *before Lord Gifford (Ordinary), who remitted the inquiry to Mr. Mumford, Lloyd's surveyor at Glasgow, to examine the state of the main deck of the *Bear*, and the erections, structures, and coverings thereon, so far as the

(¹) 17 & 18 Vict. c. 104.

same bore upon the question as to the measurement of the registered tonnage.

Mr. Mumford drew up an elaborate report. The following are extracts :

The upper or third deck does enable the ship to carry cargo on most parts of the main deck with greater safety than if it was without the protection afforded by it. The upper deck, however, being separated in two places by gaps made quite across the vessel, and of the respective width of 13 ft. 6 in. and 8 ft. 6 in., is not practically a complete deck for all purposes of safety to ship and cargo; the hatches and doors referred to, not being efficiently secured, would admit of leakage in the wake of these openings.

This deck being separated by openings completely across the vessel, and these openings being provided with planks and hatches unsuitable to any weather deck, which are not fastened down or rendered watertight, I do not consider it a continuous deck. The want of strength and efficiency of the gangway doors, and the position of the steerage side scuttles in the *Bear*, would therefore prevent her from being loaded down, as a three-decked ship, with well secured ports, may with safety be laden and sent to sea. If loaded regardless of these points the vessel would be unseaworthy.

The shipowners were desirous to have a proof; but this was opposed by the Lord Advocate—and the Lord Ordinary refused it, pronouncing his judgment on Mr. Mumford's report. His Lordship held, that "the space above the main deck intervening between the aft end of the forecastle and the front of the poop ought not to be measured or included as part of the register tonnage of the *Bear*."

The Lord Advocate reclaimed to the Second Division, who affirmed the Lord Ordinary's interlocutor (*).

In support of the appeal to the House of Lords, *The Attorney-General* (*), *The Lord Advocate* (*), *The Solicitor-General* (*), and Mr. *Beasley*, appeared.

Mr. *Southgate*, Q.C., and Mr. *E. Kay*, Q.C. were heard for the respondents.

*At the close of the argument the following opinions [411] were delivered by the Law Peers :

THE LORD CHANCELLOR (*): My Lords, the ground upon which the rectification of the register is asked for, is that the *Bear* has a spar deck above the main deck, and that the space between the main deck and this spar deck ought to be measured, in accordance with the rules contained in the Merchant Shipping Act of 1854. The 5th sub-division of the 21st section of that act provides that "if the ship has a third deck, commonly called a spar deck, the tonnage of the space between it and the tonnage deck shall be ascertained." Then follow certain rules for measurement. The question is, has the *Bear* a third deck, commonly called a spar deck? The condescendence of the appellant affirms that she has.

(*) 3d Series, vol. xi., p. 440.

(*) Sir John Holker, Q.C.

(*) Sir Richard Bagge, Q.C.

(*) Lord Cairns.

(*) Mr. Gordon, Q.C.

1875

Lord Advocate v. Clyde Steam Navigation Company.

No proof was allowed to the respondents, although they desired to have a proof; but the case was by an interlocutor of the 18th of May, 1872, remitted to Mr. Mumford, Lloyd's surveyor at Glasgow, to examine the Bear, and

to report as to the state and position of the main deck, and of the erections, structures, and coverings thereon, as far as the same relate to the question as to the measurement for the registered tonnage.

Under this remit Mr. Mumford made his report, and the statements in that report, and the model referred to in it, are the only materials before your Lordships as regards the facts of the case. It appears from this report that

the deck in question being separated by openings completely across the vessel, and those openings being provided with planks and hatches unsuitable to any weather deck, which are not fastened down or rendered water-tight,

is not considered by Mr. Mumford to be a continuous deck. The report further states that

the doors are not fitted so as to be water-tight against any pressure, and the planks, top-sills of the doors, &c., covering the cuttings in the deck, are not made to fit so as to be efficacious in sheltering the cargo beneath them. A three-decked ship is usually loaded down, so that her main or middle deck amidships is at or below her water-line; the usual custom being that her submerged side amidships, measured from 412] the top of the upper deck at the side to the water-line, should be three inches to every foot of her depth of hold. The want of strength and efficiency of the gangway doors, and the position of the steerage side-scuttles in the Bear, would therefore prevent her from being loaded down as a three-decked ship. If loaded regardless of these points the vessel would be unseaworthy.

I think it clear that the kind of upper or spar deck mentioned in the act of Parliament is a continuous deck from stem to stern, fastened down and water-tight, sealing up the cylinder formed between the two decks, and making it a fit place for the stowage of cargo, like a hold.

In the case of the Bear, the upper deck plays rather the part of a covering platform for the main or tonnage deck. This covering is fixed for a certain distance. But in this covering there are two gaps made quite across the vessel, one before and one behind the funnel, and, as Mr. Mumford observes, the deck is not practically a complete deck for all purposes of safety to the ship and cargo. The Bear being a steamer used for coasting purposes, and chiefly for the conveyance of cattle, this which is called a deck is in reality a covering run along the ship, above and parallel to the main deck, for the purpose of affording shelter against weather, and at the same time affording a platform along which the crew can pass in navigating the ship. The cargo between this covering and the main deck is not cargo stowed and sealed up in a hold, but is deck cargo protected against the weather.

I am therefore of opinion that the Bear has not a third

deck, commonly called a spar deck, within the meaning of sub-division 5 of sect. 21.

But it was contended that the register tonnage should be increased under sub-division 4 of the same section.

It appears to me that the condescendence and pleas in law are confined to the case advanced under the 5th sub-division of sect. 21, to which I have referred. But, even if this were not so, the argument under the 4th sub-division does not appear to me to be capable of being supported. The part of the deck underneath the movable covering cannot in any sense be called a "permanent closed-in space on the upper deck, available for cargo." It is the whole of the deck underneath the covering, and there is no inclosure or separation of one part of the deck, cutting it off from the rest of the deck, nor is it a "space available for cargo," in the *sense in which cargo is used for the purpose of meas- 413] urement. The cargo underneath the covering would be deck cargo merely. Neither is it "space available for the berthing or accommodation of passengers or crew;" nor is it suggested that it has ever been used for that purpose.

On the whole, I am of opinion that this appeal fails, and I submit to your Lordships that it ought to be dismissed with costs.

LORD HATHERLEY: My Lords, the onus of proof rests in a very peculiar manner in this case upon the pursuer, because he seeks to alter a survey made by an official surveyor. Therefore to decide against the respondents would be in effect, as it seems to me, not only to disregard Mr. Mumford's report, but to disregard the view of the surveyor who originally surveyed the ship, and who certainly did not then think of including these erections as coming within either the 4th or the 5th sub-sections of the 21st clause of the Merchant Shipping Act.

LORD O'HAGAN: My Lords, I am of the same opinion. I have not been at all affected by the considerations of public policy and the possible results of our decision, one way or the other, which have been pressed upon us, mainly by the Attorney-General. Such considerations may sometimes, but very rarely, be regarded as throwing light on the terms of a statute when obscure. But here we have nothing to do but to apply to the facts the plain words of the enactment, whatever may be the consequences either to the revenue or to the mercantile community.

The report of Mr. Mumford seems to me to conclude the case on both its branches. He is the sole witness; an expert named by the court, and appealed to for his judgment

1875

Lord Advocate v. Clyde Steam Navigation Company.

by both parties. The Crown officials cannot object to his competency and correctness, for they have insisted that by his evidence alone the matter should be determined; and, if it is to be relied on, the Bear is not a three-decked ship, according to the contention of the appellant. In her original certificate of registry she was described as a two-decked ship, and rightly so described if Mr. Mumford is warranted 414] *in saying that her awning deck is not a continuous deck, is not that which is commonly called a spar deck, and, therefore, does not constitute a third deck within the meaning of the statute. He makes this still more clear when he states that the Bear cannot, without becoming unseaworthy, be loaded as a three-decked ship; and if she cannot, it would seem that the measurement of her tonnage should, in fairness as well as in accordance with the terms of the statute, be proportioned to her carrying capacity, and that she should be dealt with as a two-decked vessel.

I was struck by an observation of the Attorney-General, with reference to the danger of allowing shipowners to escape their proper liabilities by leaving portions of their vessels in an imperfect state, so as to keep them unreachd by the exact description of the statute, and yet to make them available for profit on occasion. I am not prepared to say that such a danger may not arise, and that such an evasion ought not, if possible, to be prevented. But, in this case, I do not find any proof of a purpose of the kind. The respondents deny it, and the sole witness, Mr. Mumford, does not allege it. Upon his testimony it seems impossible to hold that there is, in the place to which the question has reference, a space "permanently closed in" and suitable for the reception of "cargo or stores" or "the berthing or accommodation" of human beings. This is made clear by the report, which described the place as in a condition wholly unfitting it for the reception of perishable goods or the safe and reasonably comfortable lodgment of passengers or sailors. By that report the Crown has elected to stand, excluding all access to other evidence and means of information; and, according to its findings, I think that the judgment of the Court of Session was perfectly correct, and ought to be affirmed.

Interlocutors affirmed, and appeal dismissed with costs.

Agent for the appellant: *The Solicitor of Customs.*

Agents for the respondents: *Grahames & Wardlaw.*

[Law Reports, 2 Scotch Appeals, 415.]

March 18, 1875.

***MR. SYMINGTON (the Husband), Appellant; MRS. [415
SYMINGTON (the Wife), Respondent.**

*Judicial Separation for Husband's Adultery—Custody of the Children—No
General Rule.*

Per THE LORD CHANCELLOR (Lord Cairns): The act of Parliament ⁽¹⁾ has given the court the widest discretion to weigh the comparative advantages or disadvantages of giving the custody of all, or of any of the children, to the one parent, or to the other; and I am at a loss to conceive how any general rule can be laid down. It is the duty of the court to consider all the circumstances of the particular case.

The Sons committed to the Father—The Daughters to the Mother.

Per THE LORD CHANCELLOR: Grave as the offence in this case was, there appears to be no continuance of immorality. It is proved that the husband is affectionately attached to his children, and has always been so. He is engaged in a profitable business. I cannot perceive that an order which should take from him the custody of his sons would be conducive to their future welfare. It is a very different matter with regard to the daughters. Their mother, against whom nothing has been proved, is the natural person to have their custody.

Per LORD O'HAGAN: The father did not lead an openly immoral life, but had the character of a religious and upright man. He had a genuine love for his children, and exhibited a watchful care of them; and there does not seem any reasonable ground for anticipating that the male children will be injured if their custody be with their father; especially as they are of sufficient age to be kept at school.

Per LORD SELBORNE: Looking to the moral interest of these boys, I am not satisfied that it will be compromised by leaving them in the care of him who is their natural and legal guardian, and on whom their material interest must mainly depend.

THE marriage of the above parties took place in July, 1860. At the husband's residence, near Glasgow, they lived together harmoniously and affectionately for ten years; and there are now five children, three sons and two daughters, of the marriage.

In October, 1870, the wife's health declining, her husband charged her with insobriety; and in January, 1871, he desired her to leave him. She complied, and took lodgings in Glasgow. The fact, however, turned out to be that the husband had by this time formed an improper connection with the family nurse, a girl of sixteen, who was after- [416
wards, for purposes of concealment, sent pregnant to Ireland, where she was delivered of a child, the result of the husband's adultery.

On the 31st of October, 1871, an agreement was entered into between the parties, and the wife returned to her husband's house in the beginning of 1872; but, soon finding her position unbearable, she again departed. On the 29th of October, 1872, she wrote to her husband, saying that "cer-

(1) 24 & 25 Vict. c. 86, s. 9.

1875

Symington v. Symington.

tain facts ⁽¹⁾ had come to her knowledge which would prevent her returning to his house, and she was glad, therefore, that he proposed that they should live separate."

The subsequent negotiations having failed, the wife, on the 3d of April, 1873, commenced, in the Court of Session, the present suit against her husband for judicial separation, by reason of his adultery, praying also alimony, payable half-yearly.

The husband in his pleadings denied the adultery, but charged his wife "with being in the habit of indulging in narcotics and alcoholic liquors to excess."

Upon consideration of the evidence the Lord Ordinary ⁽²⁾ held that the alleged adultery was not proved; and he therefore sustained the husband's defence; but against this decision the wife appealed to the First Division, who recalled the Lord Ordinary's interlocutor, and found that the alleged adultery was proved; that the wife had full liberty to live separate from her husband, whom they ordered "to separate himself from her, *à mensâ et thoro*, in all time coming; finding him also liable to make payment to her of £100 for alimony yearly, at Whitsunday and Martinmas. The court further found the wife entitled to the custody of the children during their respective pupillarities, requiring the husband to deliver them up to her forthwith, and to pay her £25 per annum for each of them ⁽³⁾.

Against this judgment the husband appealed to the House, having for his counsel

The Solicitor-General ⁽⁴⁾ and Dr. *Spinks*, Q.C., who concluded ^[417] that the evidence of adultery by the husband was insufficient; that he had good grounds for his allegations against the wife; and that he ought not to be deprived of the custody of his children.

Mr. *Cotton*, Q.C., and Mr. *Thesiger*, Q.C., were heard for the respondent.

The following opinions were delivered by the Law Peers:

The LORD CHANCELLOR ⁽⁵⁾: My Lords it is seldom that there comes before your Lordships for decision a case so intensely painful in all its details as the present—painful to read, and painful to speak of.

Having considered with great care the evidence as to adultery, I am bound to say that it leaves no doubt whatever

⁽¹⁾ Doubtless having reference to the nurse.

⁽²⁾ Lord Shand.

⁽³⁾ See Court of Session Cases, 4th Series, vol. i., p. 871.

⁽⁴⁾ Sir John Holker, Q.C.

⁽⁵⁾ Lord Cairns.

upon my mind that the charge was established ; and, indeed, your Lordships upon this point did not call upon the counsel for the respondent to address you ; the adultery taking the form of seduction in the conjugal mansion of a girl of the age of seventeen or eighteen, who was acting at the time as the nurse or caretaker of the children.

The question arose whether this adultery was proved merely by the evidence of the girl to whom I refer, or whether her evidence was corroborated by any further testimony. As regards the evidence of the girl, although the Lord Ordinary did not think it right to grant a decree for a divorce, he nevertheless stated, after having had the advantage of hearing and observing her demeanor, that she gave her evidence with modesty and propriety, and, as I infer from his words, in a manner which convinced him that she was not departing from truth ; and further, with regard to her general character, we have had what may be termed, perhaps, undesigned testimony from another witness whose general intervention in the matter was such as to identify her to a great extent with the appellant—I mean Miss Walker, who, writing to the grandmother on the occasion of the girl being sent to her, said this :

“ Your granddaughter Lizzie, who has lived with us for four years, and who during that time has conducted herself with rectitude and propriety, and *awakened in all [418 our hearts a tender and sincere interest in her happiness and welfare, has in some way unknown to herself fallen into the sad position of being about soon to become a mother.”

We have, therefore, both from the Lord Ordinary, and from the main witness for the appellant, the strongest testimony to the general good character of this girl.

But, my Lords, is it the case that there is any want of corroboration of the story which this girl has told clearly, distinctly, and consistently, so far as the story itself is concerned ? I think there is the strongest corroboration, arising from the conduct of the appellant himself. There is the improbability that any person but the appellant could have been the father of the child of this girl. There was no male person but himself residing in the house where the husband and wife lived. The girl does not appear to have been in the habit of associating with any male acquaintance out of doors ; and although there appears to have been the greatest anxiety to trace her in all her movements about the time that her pregnancy would have occurred, those who so traced her appear to have utterly failed to suggest any sin-

gle person other than her master through association with whom the event of her pregnancy could have occurred. I will further remind your Lordships of the appellant's conduct when the pregnancy of this girl was discovered. He became immediately most anxious to obtain a letter from her which upon the face of it should declare that no person at Nyeholm (¹) was the father of the child. The girl appears in the first instance to have demurred to making a statement of the kind, but she was urged to do so both by the appellant and also by Miss Walker acting on his behalf; and finally, after she had passed from Scotland into Ireland, and was on the point of being placed with her grandmother, she wrote a letter, under the eye and at the instance of Miss Walker, in a form, and gave it to Miss Walker in a way, which would lead any person observing it to imagine that it had been written voluntarily by her when she was at a distance from Miss Walker, and sent by her from Ireland. Then we have that most remarkable statement in the evidence of Miss Walker, that the moment she received this letter she handed it to the appellant for the purpose of the 419] appellant handing it to *his professional agent, before a word of accusation had been said against the appellant, in order that he might be armed with this letter to answer the accusation which he clearly anticipated would be advanced against him.

Miss Walker urged from time to time that the grandmother and the relatives of the girl should extract from her a statement as to who was the father of the child—a matter which ought to have been of complete indifference to Miss Walker, and also to the appellant if he was innocent.

Mrs. Symington having left her husband's house to reside with her brother, she some months afterwards, on the 31st of October, 1872, met her husband for the purpose of arranging terms by which she might resume her residence with him. At the time she had left the house there had been no suspicion of any pregnancy of this girl, or indeed of anything actually wrong having occurred between the girl and the appellant. About a week before this 31st of October a medical man, after an examination of the girl, had reported her to be pregnant, and thereupon steps were taken for passing her over to her own relatives, who lived in the north of Ireland. At the meeting, the husband concealed from the wife that the children had lost the person under whose care they had been, and that she had left the house. Is there any theory on which this reticence on the part of the hus-

(¹) The residence of the parties.

band can be accounted for, except the theory of conscious guilt? And yet the pleading of the husband represented her as satisfied that the imputations against him were groundless, when the occurrence which of all others would have shown those imputations to be well founded had been absolutely concealed by him.

When, subsequently, Mrs. Symington appears to have come into contact with Miss Walker, and to have inquired, or to have been informed, about this girl, she was then told that she had left, not in consequence of her being in the condition to which I have referred, but for some trivial fault, or for some want of efficiency as a servant.

My Lords, I have referred in general terms to these various circumstances which appear to me to amount to the strongest corroboration of the charge against the husband; and I am unable to understand how any other conclusion upon these facts could be arrived at than that the [420 charge of adultery had been established.

But now, my Lords, I turn to a very difficult and hardly less painful part of the case—with regard to the custody of the children, five in number. By the 9th section of the Conjugal Rights (Scotland) Act (1) there is a provision very analogous to the provision in the English act (2) upon the same subject, viz.:

In any action for separation *a mensa et thoro*, or for divorce, the court may from time to time make such interim orders and may in the final decree, make such provision, as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates.

Reference in course of the argument was made to authorities both in England and Scotland; and it was suggested that, certainly in England, the analogous provision to that which I have read had been acted upon in this way,—that where a wife established her title either to a divorce or to a judicial separation, it was either matter of course, or almost matter of course, that the decree should carry with it for her the custody of the children; and that having shown good cause for severing the conjugal tie, she, not being in fault herself, should not be amerced or punished by being deprived of the custody of her children. My Lords, I should greatly regret that any general rule, so sweeping, and, as it appears to me, so inconvenient in its working, should be laid down on a subject of this description. It ap-

(1) 24 & 25 Vict. c. 86, s. 9.

(2) 20 & 21 Vict. c. 85, s. 35.

1875

Symington v. Symington.

pears to me that the act of Parliament has given the court the widest and the most general discretion, and has purposely done so; and I think it must be the duty of the court to consider all the circumstances of the particular case before it—the circumstances of the misconduct which leads to a separation no doubt—the circumstances of the general character of the father—the circumstances of the general character of the mother—and, above all, it should be the duty of the court to look to the interest of the children, and carefully to weigh the comparative advantages or disadvantages of giving the custody of all or of any of them to the one parent or to the other. I am at a loss to conceive how any general rule upon such a subject can be laid down. Certainly I [421] should prefer to ask your *Lordships to act, not upon any general rule, but upon the circumstances of the case now before us.

The husband and wife appear to have lived, so far as the outside world could observe, in great happiness from the time of their marriage, during ten years, from 1860 to 1870; and during those ten years the five children whom I have spoken of, and another child, who is dead, were born. In 1870 it appears clear that the health of Mrs. Symington was considerably impaired; and there arose in the mind of her husband, as between him and his wife, some want of that complete harmony which had previously prevailed. He suggested, indeed broadly stated, to the family of his wife that she had been in the habit of indulging to excess in narcotics and in the use of stimulants. I pass over a lengthened correspondence which arose upon that subject, in which the family of the wife appear to have commented mainly upon the statements made by the husband, and to have had no other knowledge upon the subject.

As time went on, these charges were made to the wife herself, and persevered in by the husband with an obstinacy, and I must say a harshness, and perhaps coarseness, which cannot but strike the mind with feelings of the gravest reprehension. The wife, in the first place, denied the charges, but it appears that in the early part of the year 1871, at the house of Mr. Leckie, she made a very vague and brief verbal statement, which was said to be, and was from that time forward called by the husband, a confession of the charges which he had made. She stated afterwards that what she had said was under the pressure of constraint, and in the hope that it might satisfy her husband, and that he might not persist in an arrangement which he had been proposing, that she should live for some time with her friends. How-

ever, the statements she made had not that effect, and she went for some months to reside with her friends. At the end of that residence came the agreement of the 31st October, 1871. It is an agreement in writing, and it was signed at the house of Mr. Leckie, after considerable discussion and remonstrance on both sides, which had lasted for several hours. I do not stop to read it over, but your Lordships will remember that it carries upon the face of it expressions which certainly are not a repudiation, but are in a qualified way *open to the construction of enter- [422 taining and reasoning upon the charges made by the husband against the wife in this respect. That agreement again the wife asserts, so far as it has the bearing which I have mentioned, was obtained from her under pressure, and when she had no assistance which would have enabled her to resist it (¹).

I find no evidence whatever which would justify any charge of habits such as are alleged against the wife. And your Lordships have to consider this, that there has been given to the husband in this case the fullest and the most ample opportunity of adducing any evidence which he was able to adduce upon this subject. He appears to have spared no pains for that purpose. The wife was scrupulously and jealously watched in her own house by eyes which certainly were not friendly to her. If these habits were habits to which she was addicted, the means of supplying the indulgence of them could not have been possessed by her without traces being left, which traces could easily have been exhibited in evidence.

It appears to me that the conduct of the husband in making these charges was that of an obstinate, overbearing, tyrannical man, drawing conclusions from insufficient premises, and blindly refusing to be undeceived in ideas which he had once entertained.

My Lords, the result of the view which I take of the case is this—that there is nothing established against the wife which can disentitle her to be considered a person who ought to have the custody of the children if, on other considerations, it is proper to assign that custody to her. The children are five in number, and the three elder are boys. The boys were born in the years 1863, 1864, and 1866, and they are now, as we understand, boarders at school. The two younger children are girls. They were born in the years 1868 and 1870. The husband is engaged in business, which appears to be not otherwise than profitable. He is in middle

(¹) The agreement is set out in the Respondent's Case, p. 172.

life, and it is proved that he is affectionately attached to his children, and has always been so. I must say also that, although deploring, and severely reprehending the conduct established, and the sin proved against him, it is also to be borne in *mind that until the commission of that offence he 423] bore, and apparently justly bore, a high character for uprightness and morality in the world; and it is some consolation to observe that grave as the offence proved in this case was, there appears to have been no continuance of immorality, and I trust that I am not saying too much when I say that there is reason to hope for a return on the part of the husband to the paths of morality and propriety of life.

The Court of Session have removed the custody of the whole of the children from the husband and given it to the wife. With regard to the boys, I cannot, for my own part, perceive that an order which should take their custody from their father and hand it over to their mother, would be conducive to the future welfare of the children. It is a very different matter with regard to the girls. I think their mother, not being proved to be in any way disqualified from having the custody and care of the girls, is the natural person to have that custody and care. On both sides there ought to be a careful opportunity of access, so that none of the children may grow up without as full knowledge and as full intercourse as the case will admit of with both parents, in the hope that a curtain of oblivion will be drawn over all that has occurred.

The order which I should suggest to your Lordships to make in this case would not interfere with the interlocutor of the 20th of March, 1874, so far as it finds adultery proved and decrees separation, ordering also the payment of aliment, but varying the interlocutor as to the custody of the sons⁽¹⁾.

If your Lordships should concur in the variation of the interlocutor which I now propose, I think, having regard to the fact that upon the main question in the suit your Lordships agree with the court below, and also having regard to the fact that the respondent could not be made to bear costs as against her husband, the costs of this appeal should be awarded to the respondent.

LORD O'HAGAN: My Lords, in this lamentable case we 424] are required to determine *whether the adultery of the appellant has been sufficiently established; and, if it has, to what custody shall his children be committed?

⁽¹⁾ The final judgment of the House, as proposed by the Lord Chancellor, is set out at the close of the report.

On the first question we have been fairly pressed by the argument that the Lord Ordinary, who had the advantage of seeing the witnesses and judging of their veracity from their demeanor before himself, should not have his decision lightly set aside. And, undoubtedly, the value of *viva voce* testimony can be much better ascertained by those who hear it than by those who know it only from report. But there is this peculiarity in the present case, that the Lord Ordinary has put us somewhat in his own position, and enabled us, so to speak, to see with his own eyes, when he states the impression produced on him by the principal witness, and describes her as "a girl of modest appearance, who gave her testimony, generally, with an air of truthfulness." And he speaks favorably of her aunt, another witness, whose part in the transactions is of great importance. Besides, we are concerned, directly, not with the judgment of the Lord Ordinary, but with that which overruled it; and the latter we ought to affirm, unless we are satisfied of its error.

Direct corroboration by eye-witnesses of the guilt of the appellant there is not, and in cases of this kind it can rarely exist; but the corroboration supplied by his own subsequent conduct seems strong and persuasive. Such corroboration may be of the most satisfactory character, and is every day accepted as conclusive in the most serious cases. It is very difficult, indeed, to reconcile with a presumption of conscious innocence the sending of the girl to Ireland in the companionship of Miss Walker; the repeated attempts to obtain from her a declaration exonerating from the blame of her seduction the inmates of Nyeholm, in which the appellant was the only male resident; the falsehoods patent on the face of that letter, which were not, certainly, the emanations of her own mind; the unworthy trick of posting it in Ireland, addressed to Miss Walker, at Glasgow, with the purpose of establishing another falsehood, that it was not written in Miss Walker's presence, or under her influence; and the further falsehood, that it was not shown by Miss Walker to any one, although she had, on her arrival in Scotland, given it to the appellant, who handed it to his lawyer to be used, manifestly, if the precise charge we are *investigating should be made against him. In some [425 of these transactions Miss Walker acted whilst the appellant was absent, but it is clear that they were begun with his full knowledge and assent, that they were carried through by his agent, and that he took advantage of their result;

1875

Symington v. Symington.

and therefore he can scarcely complain if he be held responsible for the consequences.

We have been much and properly pressed by the very strong evidence as to character given by gentlemen of position and high intelligence; and we have been asked to remember the maxim which experience sustains, "*Nemo repente fuit turpissimus*." An accused man should have the benefit of the presumption of integrity which arises from the virtue of a lifetime. But it is open to the observation, that, in cases of this peculiar kind, general good character is of less value than in others. It must often be accepted as a doubtful answer to such charges of moral aberration as affect the appellant, when positive proof encounters the presumption.

On the question of fact, I feel obliged to concur with my noble and learned friend, and on the question of discretion, I, also, concur with him.

The jurisdiction as to the custody and education of children committed to the English and Scotch Courts by the Conjugal Rights Act and the Divorce Act is identical and very extensive, and involves great responsibility for its judicious exercise. We are bound to have regard, not to any mere technicalities, or hard and fast rules of practice, but to the real interests of all the parties whom our decision may affect, and to do, for all, what may seem most judicious. The father's right to the guardianship of his child is high and sacred. Our law holds it in much reverence; and it should not be taken from him without gross misconduct on his own part and danger of injury to the health or morals of the children. His proved adultery must, under certain circumstances, make the withdrawal of it inevitable; but bad as the offence may be, there may be considerations of convenience and advantage to the children which, if injury to them be not likely to arise, should forbid their withdrawal from the father's care.

We are reasonably required to consider that the father in this case did not lead an openly immoral life, or do any acts 426] which, **coram populo*, could deprive him of the character he had acquired as a religious and upright man; and that, in his general dealings with his household, he acted with strict propriety. Upon the evidence, he is entitled to say that neither before nor after the one seduction has anything of immorality been proved against him. It is not likely that the bitter experience he has had of the consequences of a departure from the line of duty will induce him to a change of conduct calculated to justify the accusa-

tions he has so strenuously denied, and there is, therefore, apparently reason for expecting more careful avoidance, at least of any open misconduct or ill example, in the future than in the past. Then, he seems to have had a genuine love for his children, and to have exhibited a watchful care of them.

Considering these things, there does not seem any sufficient ground for anticipating that the male children will be injured, morally or otherwise, if their custody be continued with their father, especially as they are of sufficient age to be sent to school. He will be subject, at all times, to the vigilant observation of their mother, who will have full access to them, and the continual supervision, and, if it should be necessary, the prompt intervention, of the court for their protection from any evil. And, if this be so, there are, on the other hand, patent considerations affecting the interests of the children and their prospects in the world, which make it undesirable that the connection with their father should be broken off, leaving him in lifelong isolation, and depriving them of the material benefits which they may anticipate at his hands. The words of Lord Neaves, in *Lang v. Lang*⁽¹⁾, to which we have been referred, are sensible and just: "If we take a man's children from him we leave him a solitary being, and deprive him of the most powerful inducement to amendment of life. It is not that he has committed faults, but that he teaches, or is likely to teach, evil to them, and to corrupt their morals, that can alone entitle us to interfere." And, in addition, I am affected by the consideration that an absolute separation of the appellant from all his children might not only deprive them of important advantages, to be derived from him hereafter, but would, also, destroy the *possibility of that reunion of the husband and [427] wife which, notwithstanding all that has occurred, may yet, I trust, and perhaps through their intercourse with the children, to whom they are bound by a common affection, be happily accomplished.

I am bound to say, that I fully concur with the Lord Chancellor as to the failure of proof of the charges against Mrs. Symington; and I concur with him further in his condemnation of the excessive harshness and severity with which she was treated, and which, in my opinion, would have had no adequate justification even if every one of those charges had been clearly established.

Agreeing on both the questions in the case with my noble and learned friend, I fully approve the advice he has given your Lordships.

(1) 7 Macp., p. 447.

LORD SELBORNE: My Lords, entirely agreeing, as I do, with the explanation which my noble and learned friend on the woolsack has given of his grounds for adhering to the decision of the Court of Session, so far as relates to the painful subject of adultery, I do not propose to say one word more on that part of the case.

With respect to the more difficult and not less anxious portion of the case, as to the custody of the children, I will take the liberty of making a few, and only a few, observations. I do not think it necessary to add anything to the reasons stated for leaving the girls under the mother's charge. The difficulty, in my mind, has had relation to the boys alone, as to whom I do not think that the right of the father or the right of the mother stands in a position which can make it otherwise than proper for your Lordships to turn the balance by having regard to the interests of the children. The interests of those children, of course, is to be regarded from two points of view. Their material interest obviously is not in the direction of complete separation from their father, from whom apparently their means of support in life are entirely derived. No doubt the moral interest is, in cases of this kind, of even greater importance than the material; but, looking to the moral interest of these boys, I am not satisfied that it will be compromised by leaving them in the care of him* who is *prima facie* their natural 428] *and legal guardian, and on whom their material interest must mainly depend. The offence of the father was neither preceded nor followed by any generally vicious course of life. There is in many, if not in all men a constant inward struggle between the principles of good and evil; and because a man has grossly fallen, and, at the time of his fall added the guilt of hypocrisy to another sort of immorality, it is not necessary, therefore, to believe that his whole life has been false, or that all the good which he ever professed was insincere or unreal. I will hope better things of this gentleman; and I am willing to believe that before these unhappy events he was a man sincere in his profession of right principles, and desiring to do what was right, and that it is not beyond hope that he may hereafter live in accordance with that profession.

Entirely concurring in what has been said as to the absence of any evidence to justify the imputations upon the wife, also entirely concurring in what has been said as to the absence of any justification of the husband's conduct towards her, even upon the hypothesis that he fully believed those imputations to be true, still I am bound to say that

I cannot agree with the court below in holding that those imputations originated in a deliberate purpose of injustice to the wife, much less in any purpose to cover, by means of that injustice, the further wrong committed. Dr. Stark, a witness not impeached, proves that four years or more before these unhappy events, and when the husband and wife were living on terms of apparently uninterrupted affection, the husband consulted him, being even then under the impression that the wife was injuring her health by the use of stimulants. Dr. Stark himself drew a similar conclusion. I cannot but believe Dr. Stark, who, if he is to be credited, distinctly proves that these ideas in the husband's mind originated at a time and under circumstances which are absolutely inconsistent with that hypothesis of his motives which the Court of Session thought it right to adopt.

In that state of things I do not think that the conduct of this gentleman has been such as to give your Lordships sufficient reasons for apprehending that the moral, any more than the material, interests of the boys will suffer if they are, upon the *terms and under the safeguards which [429 have been recommended, left under their father's care.

The final judgment of the House was as follows: Ordered and adjudged, That the interlocutor or judgment of the Lords of Session in Scotland, of the First Division, of the 20th of March, 1874, complained of in the said appeal, be, and the same is hereby affirmed, except in so far as the said Lords "find the pursuer entitled to the custody of the children of the marriage during their respective pupillarities, so long as no other or different order may be made by the court with regard to them or any of them, and decern and ordain the defender forthwith to deliver over the said children to the custody of the pursuer accordingly: Find the defender liable to the pursuer in aliment, at the rate of £25 per annum for each of the said children, so long as they shall respectively remain in her custody in terms hereof, subject to the burden on her part of providing for the clothing and education of the said children respectively, beginning the first payment of the said aliment on the 1st day of April next, for the period between that date and the term of Whitsunday next, and the second payment at the said term of Whitsunday next for the year immediately following, and so on half-yearly thereafter, at the two terms of Martinmas and Whitsunday, so long as such aliment shall be payable as aforesaid, with the lawful interest on each termly payment, from the date when the same falls due till paid, and decern for the foresaid re-

spective sums of aliment accordingly, and allow the foresaid judgment and decrees to go out and be extracted *ad interim*, reserving to both parties respectively, in the event of any material change of circumstance, or of any dispute arising as to the education of the said children, or any of them, or of any different or further regulations becoming necessary, to apply to the court for such variation on the foresaid sums of aliment, or any of them, or upon the foresaid directions as to the custody or education of the said children respectively, or for such regulations as to access to the said children, or otherwise, as the court may consider reasonable :” which findings and decernitures are hereby recalled ; and in place thereof, it is ordered and adjudged, That the pursuer (respondent) is entitled to the custody of the two youngest children (Agnes and Margaret) of the marriage during their respective pupillarities, so long as no other or different order may be made by the Court of Session with regard to them, or either of them, but with such direction for access of the defender (appellant) as the said court shall think reasonable, and subject to the obligation of not removing them, or either of them, from out of the jurisdiction of the said court : and it is hereby ordered, that the defender (appellant) do forthwith deliver over the said two children to the custody of the pursuer (respondent) accordingly : and it is further ordered, That the defender (appellant) is liable to the pursuer (respondent) in aliment at the rate of £25 per annum for each of the said children, so long as they shall respectively remain in her custody in terms hereof, subject to the burden, on her part, of providing for the clothing and education of the said children respectively, beginning the first payment of the said aliment on the days already fixed by the said interlocutor, namely, on the 1st day of April next, 430] for the period *between that date and the term of Whitsunday next, and the second payment at the said term of Whitsunday next for the half-year immediately following, and so on half-yearly thereafter, at the two terms of Martinmas and Whitsunday, so long as such aliment shall be payable as aforesaid, with the lawful interest on each termly payment from the date when the same falls due till paid : and it is further ordered, That the defender (appellant) is entitled to the custody of the other children of the marriage during their respective pupillarities, so long as no other or different order may be made by the said court with regard to them, or any of them, subject to the obligation of not removing the said children, or any of them, from out of the jurisdiction of the said court, and also to the burden of

providing for the maintenance and education of the said children according to such directions as shall from time to time be given by the said court for that purpose, and also subject to such regulations for securing the access of the pursuer (respondent) to the said children, or the occasional residence of the said children with the pursuer (respondent), as the said court may consider reasonable; reserving to both parties respectively liberty, in the event of any difficulty, dispute, or change of circumstances, to apply to the said court for such variation on the foresaid terms of aliment, or the foresaid directions as to custody, education, and access, as the said court may consider reasonable: and it is further ordered, That the defender (appellant) shall not be entitled to repayment from the pursuer (respondent) of the sums paid by the defender (appellant) to the pursuer (respondent) for the aliment of the said children during the period they were in her custody in virtue of the said interlocutor; and it is further ordered that the appellant do pay, or cause to be paid, to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments: and it is further ordered, That the cause be, and the same is hereby remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment; and it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calender month from the date of the certificate thereof, the Court of Session in Scotland, or the Lord Ordinary officiating on the bills during the vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

Agent for the appellant: *William Robertson.*

Agents for the respondent: *Grahames & Wardlaw.*

See notes 4 Eng. Rep., 267; 6 Eng. Rep., 553.

Where a father placed his daughter 13 years of age with a woman of notorious bad character, which from the contiguity of his residence he was presumed to know, the court refused to order her delivery to him, but ordered her into the custody of a benevolent institution for the protection of females: *Matter of Clifton*, 47 How. Prac. Rep., 172.

In *Rouse v. Rouse*, 28 Michigan, 353, the court held that in a controversy be-

tween parents for the custody of their children, the children are interested as deeply as the parents, and the court will not take any steps within its discretion which might prejudice them, even in case of misconduct on the part of the contending parents. See also *Hewett v. Long*, 76 Illinois, 390.

The court of chancery has jurisdiction to restrain a father from interfering with the religious education of his child: but that jurisdiction will not be exercised unless the court can see that the interference of the father will be

1875

Symington v. Symington.

injurious to the happiness and welfare of the child : *Matter of Meades*, Irish Rep., 5 Eq., 98.

In an action for divorce the court will exercise its discretion as to the custody of the children of a marriage with a view to subserve the best interests of the children.

It may in its discretion award the care and custody of the minor children to either party, and direct by whom and how they shall be maintained, whatever may have been the ground of the divorce ; or it may provide (as in this case) that one party shall be the guardian for nurture, and the other guardian for the mental education and discipline. In general all other circumstances being equal, the paramount common law right of the father will be recognized ; but if the divorce has been granted for his fault or misconduct, such fault or misconduct may properly be considered by the court in the exercise of its discretion. In this case a divorce being granted to the wife for desertion, the court awarded the care and custody of a boy fourteen years old to the father for the purposes of education *so long as he should keep and maintain the child at a particular school*, but otherwise the custody to be and remain with the mother ; the mother to have access to the child at all times, and the child to visit her at her home, at the father's expense, at least twice a year during vacation : *Welch v. Welch*, 83 Wisconsin, 584.

In the case of *The Commonwealth v. Maxwell* (6 Law Reporter, 214, not reported in the regular reports), the Supreme Court of Massachusetts (June Term, 1843), held that in general the father is entitled to the custody of his infant children, but this right is not absolute and may be controlled.

Whenever the father is unfit for the care of his children, their good being the predominant consideration, the courts will not interfere to restore them to his custody.

Under the circumstances of this case it was ordered that the children be remanded to the custody of the mother, who had separated from her husband in consequence of his neglect to properly provide for his wife and children and had gone to reside with her brother who properly provided for them. No acts sufficient to sustain a divorce for

cruelty were proved. The court (pages 217-8) said that in general the father is by law entitled to the custody of the children. But the right of the father is not entirely absolute ; the children are not his property, and their good is to be regarded as the predominant consideration. The court will not interfere to restore them to the father, in a clear case of unfitness on his part for their care and custody. In the present case the evidence is conflicting, and not easily reconcilable. The witnesses on the part of the respondent represent her situation and that of her children, while they lived with her husband, as having been very uncomfortable ; and that at times he failed, through negligence or inability, to provide for them suitable and sufficient food and raiment, and a comfortable dwelling house. A different representation is made by the witnesses on the part of the husband. But a considerable portion of their testimony is of a negative character, and may be reconciled with the evidence on the part of the respondent, and we think that that part of the evidence on the part of the husband, which is of a positive and affirmative character may also be reconciled, in most, if not all respects, with the evidence produced by the respondent, by the supposition that the neglect of the husband to make suitable provisions for his family, was not continuous and uniform, but that their wants were better supplied at the times when some of the witnesses on the part of the husband lived in the family, than they were when no one but Mrs. Mann resided with them. Considering the whole evidence, there is much reason for the apprehension, that if the children should be restored to the custody of their father, they would suffer for want of suitable provisions for their comfort and support. On the other hand there can be no doubt, if they should be suffered to remain with their mother, they will be comfortably provided for. This probably the mother would be able to do without the aid of any one. But her brother, Dr. Mann, has promised to support her and her children, and offers to give security for the performance of his promise, so that it seems to be sufficiently certain that the children, under the care of their mother, will be well provided for.

Another consideration has great

weight. If the father could and would supply his children with suitable food and clothing, and a shelter from the inclemency of the weather, there are other wants which, during their tender years, no one can so well supply as their mother. During the age of nurture she is the most appropriate and fit person to watch over and take care of them—no other woman can fully supply her place. One of these children is under the age of one and is still nursed by its mother. The other is very young, and to allow these children, during their tender years, to be torn from their mother, would seem to be inconsistent with the laws of nature and the comfort and well-being of the children. We therefore have no doubt upon the whole matter that the comfort and welfare of the children will be best secured and promoted by confiding them to the care of their mother."

A maternal aunt of an infant, who is possessed of no property, has no *legal* right to the custody of the infant as against one to whom the deceased mother gave the child before her death: *Matter of Medley*, Irish Rep., 5 Com. Law, 84.

In *Noel v. Noel*, 34 New Jersey Equity Rep., 137, a suit was pending by the wife for a divorce on account of the husband's alleged adultery. The situation and circumstances of the mother being such that she was able to educate and rear her children, and her entire fitness, intellectually and morally, for the work clearly appearing, in view of the immorality of the father, the custody of the children was awarded *exclusively* to the mother.

In *Waltham v. Waltham* (1 Labatt, Cal. 146), the court held that "If the father is insolvent, and unable to provide for the maintenance of the children and the mother is possessed of property, and is properly supporting and educating them, the court will not interfere with that custody while an action for divorce is pending between the parties. The court will take into consideration the abandonment of the family by the father, and the probable desire to annoy and harass the mother by this application, because she has applied for the divorce on the ground of desertion." The court said: "In no case do I find this legal right of the father asserted where a divorce has

been granted for his fault or misconduct. * * It appears from the evidence that the wife is an industrious, hardworking woman,—her neighbors speak well of her—she has some property—the children are well cared for—they are happy and contented and desire to remain with her. The father shows a most excellent character for industry and sobriety, and is engaged in an honest and useful occupation, but yet the evidence shows that he is not entirely free from blame. I can discover no justifiable cause for his desertion of his wife and children; he has remained absent from them eight or nine months—has made no effort at reconciliation, and during the whole period has failed or neglected to provide one dollar for their maintenance and support. He exhibits no desire for the care and custody of the children—evinces no disposition to educate, clothe and support them,—until after his wife has instituted proceedings against him for a divorce. Then, and not until then, he discovers that she is an improper person to have their care and custody. His conduct excites a suspicion, that in instituting this proceeding, he was actuated more by a desire to harass and annoy her, than from love and proper affection for the children, and the evidence shows that he is in insolvent circumstances."

See also *Hewett v. Long*, 76 Ill., 399.

In *Swift v. Swift*, 4 De Gex, Jones & Smith, 710, a husband who had indecently conducted himself towards an infant female child of the marriage, and separated from his wife in consequence, covenanted in the separation deed that the children of the marriage (who were infants) should at all times thereafter be under the sole care, management and protection of the wife. Held that the covenant was not contrary to public policy, and was enforceable in equity at the suit of the wife, but that an injunction granted to restrain the husband from proceeding to obtain the infant children should not be a perpetual injunction, but one until further order only.

In *Regina v. Smith* (Lowndes & Maxwell, 132), it was held *at nisi prius* that *at law* a contract by the father of a child with another person that the latter shall have the custody of the child is in the nature of a consent merely and

1875

Symington v. Symington.

may be revoked by the father and that the court will, upon such revocation, grant a *habeas corpus* to bring up the body, of the child. This case turned upon the strict *legal* rights of the father and is contrary to the cases cited in notes 4th and 6th Eng. Rep., where the *equitable* rights of a third person under such circumstances were considered.

In *Hewett v. Long*, 7 Chicago Legal News, 73, 76 Illinois, 399, the mother had obtained a divorce from the father and had been awarded the custody of the daughter by the Illinois courts. The father had removed to Iowa, married again and became wealthy. On petition the court below allowed the father the custody of the daughter and to take her to Iowa, on giving bond to produce her when required by the court. On review the court reversed such order, holding that the modification of the decree was clearly unjust to the mother. As the parties stood before the court, the father is the guilty and the mother the unoffending party. He has become a stranger to the child, and deprived himself of her society by his own voluntary and deliberate act. He, judging him by his conduct, must be quite destitute of affection for the child, while the mother is bound to her by the strongest ties. It was further held that the laws of Illinois were the birthright of the child, and she should not be allowed to be taken from the state without her consent. That the court ought not to authorize the removal of its ward beyond its jurisdiction.

In *Wilson v. Wilson* (45 California, 399) it was held that "If, after a decree of divorce has been granted and the wife has been awarded the custody of a child, she petitions the court for an order requiring her former husband to make provision for the support of the child, the court may make an order of allowance for the past as well as future support of the child. If a decree of divorce is entered, and a stipulation of the parties made at the time, that the wife shall receive a sum certain as her part of the common property, and shall have the custody of the infant child, and that such sum shall be in full for her allowance for the support of the child, such stipulation does not deprive the court of the power to afterwards, on

her petition, make her an allowance for the support of such child."

In *Harris v. Harris* (5 Kansas, 46), a child of the marriage was born after the decree for divorce. The mother brought suit against the father to recover for its support. It was held the suit would not lie but that the remedy of the mother was to petition the court to so far open the decree as to make such provision for the support of the children as might be just under all the circumstances, or by other proper proceedings under or supplemental to the original decree.

See 4 Eng. Rep., 649. In New York it is held that unless the final decree reserves a right to the wife to apply for further alimony, she cannot do so; that though nothing be said on the subject of alimony the court must be presumed to have finally passed on the question and decided adversely to the claim of the wife; that all jurisdiction over the parties terminates with the judgment: *Kamp v. Kamp*, 59 N. Y., 212. So also in *Iowa: Wild v. Wild*, 36 Iowa, 319.

In Illinois it is held that the mother of a child to whom it is awarded in divorce, may recover of the father for its support, so long as it cannot earn its own living: *Plaster v. Plaster*, 67 Illinois, 93.

In Indiana it is held a decree awarding the custody of a child to the mother is final and cannot be opened, although the court may reserve leave to apply. If not reserved no subsequent application to change it can be made: *Sullivan v. Learned*, 49 Ind., 252. In Maine it has been held that an allowance for alimony does not expire with the death of the husband: *Miller v. Miller*, 64 Maine, 484.

It has been held that although the custody of a child has been awarded to the mother, that if the father by will gave an estate to the child upon condition that it should be brought up and remain with the husband's mother, such condition was valid and unless complied with the child took no part of the estate. Also that notwithstanding the award of the custody of the child to the mother, the father had the right to appoint a testamentary guardian of the infant: *Davis v. McCaffrey*, 21 Grant (Upper Can.) Chy., 554.

A P P E A L C A S E S

BEFORE THE

JUDICIAL COMMITTEE

AND

LORDS OF HER MAJESTY'S MOST HONORABLE

P R I V Y C O U N C I L.

[Law Reports, 6 Privy Council, 245.]

J. C.,⁽¹⁾ Jan. 29, 30; Feb. 3, 4, 5, March 2.

*HENRY JOHN STYRING KING, Plaintiff; and ALFRED [245
PINSONEAULT, Defendant.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR QUEBEC
(APPEAL SIDE).

Res judicata—"Transaction"—*Specific Performance*—*Powers of Avoué*.

On the 31st of December, 1839, certain uncollected rents belonging to the estate of a deceased person were sold by his executors to the respondent. In 1869, the appellant, claiming as residuary legatee under the will of the deceased, sued the respondent and the surviving executor to cancel the sale and for an account and payment, and after certain abortive negotiations for a compromise, foreclosed the pleadings in the action. Thereupon a "transaction" was on the 4th of June, 1870, made between the respondent and L., the counsel and attorney of the appellant, to the effect that the cause was stayed on certain terms of payment and the foreclosure removed, "*jusqu'à nouvel avis*," which "transaction," on the 10th of June, the respondent revoked and pleaded to the action. Thereafter the appellant prayed for judgment in terms of the compromise, which was refused.

In January, 1871, the appellant brought another action to enforce the compromise, and the respondent pleaded, first, that the pendency of the original action for substantially the same cause was a bar, or that the discontinuance thereof was a condition precedent to the right to maintain a fresh one; secondly, *res judicata*; thirdly, fourthly and fifthly, that the "transaction" was conditional on ratification by the court, was made by L. without appellant's authority, and under mistake, surprise, or fraud:

Held, first, that the pendency of the first action was not a bar to the institution of the second; nor was the discontinuance of the first a condition precedent to bringing the second. The right mode of enforcing the "transaction" was by a separate action.

Secondly, the "transaction" was intended to be final, but, according to the Canada Civil Code, interpreted by the aid of the French law, L., in the absence of special

⁽¹⁾ *Present*: SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

1875

King v. Pinsoneault.

J.C.

authority, had not, by reason of his being "*avocat*" and "*avoué*," any power to bind his client thereby.

An *avoué* can, however, bind his client (until *désaveu*) by any *proceeding in the cause*, though taken without his client's authority, or even in defiance of his prohibition.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal side), dated the 17th of September, 1873, *affirming a judgment of the Superior Court for Lower Canada, dated the 31st of October, 1871.

The action in which the judgments appealed from were given was instituted in January, 1871, by the appellant to recover from the respondent a sum of \$30,000 upon a "transaction" or agreement for a compromise dated the 4th of June, 1870, by which, it was contended, another action brought by the appellant in December, 1869, and then pending in the Superior Court of the district of Montreal against the respondent and the Reverend George Burton Hamilton (the sole surviving executor and trustee of the will of the late General Napier Christie Burton, deceased) had been settled.

The nature of the first action, the circumstances which led thereto, the "transaction" of the 4th of June, 1870, and the manner in which it was effected, the nature of the second suit and the pleadings therein, are fully set forth in the judgment of their Lordships, and need not be repeated here.

The material questions raised by the pleadings in the second action, in which this appeal arose, were (1.) Whether the appellant was or not put to his election, and bound to discontinue his former action before proceeding with the present one. (2.) Whether, by allowing the respondent to plead in the former action after the compromise had been entered into, and refusing to give effect to the compromise in that action, the court had or had not adjudicated upon the validity of the agreement for a compromise, so as to bar any separate action based on that agreement. (3.) Whether the agreement in question was final, or whether it was conditional on the ratification thereof by the court. (4.) Whether the same was or not void as having been executed on a Sunday. (5.) Whether the attorney of the appellant had or had not authority to bind him by executing the agreement on his behalf, and whether it was not open to the respondent to repudiate the contract before it was formally ratified by the appellant. (6.) Whether there was or not any surprise or deceit practised on the respondent, or any such error or mistake on his part when he subscribed the agreement, as to entitle him to repudiate.

On the 31st of October, 1871, Mr. Justice Beaudrey gave

judgment for the respondent, on the ground that Mr. Laflamme, the *counsel and attorney for the appellant, had no [247 power of attorney for the appellant, and that the agreement for compromise or "transaction," could not be binding on either party until ratified by the appellant; and that before it was so ratified the respondent had withdrawn from it.

The appellant appealed to the Court of Queen's Bench of Lower Canada (Appeal side), and on the 17th of September, 1873, the court, by a majority of three to two, affirmed the judgment of the court below, though for different reasons.

The reasons given by Chief Justice Duval (who with Mr. Justice Polette and Mr. Justice Badgley, formed the majority of the court), for his decision, were to the effect that (without pronouncing any opinion on the validity of the agreement) the object of the agreement was to put an end to a pending suit between the parties, and that the agreement was therefore an incident in that suit, and could not be severed from it so as to be the basis of a separate action so long as the original suit was pending, and that the benefit of the agreement was to be obtained, if at all, by means of subsidiary proceedings in that suit.

Mr. Justice Polette (a judge of the Superior Court, sitting instead of Mr. Justice Drummond, who had declared himself incompetent to sit on the appeal), gave no reasons for his judgment, though concurring in the decision. Mr. Justice Badgley (who expressed an opinion that the agreement was invalid, and had been obtained illegally and by surprise) also concurred in the decision. The dissentient judges were Mr. Justice Monk, and Mr. Justice Taschereau, who held the agreement valid and the action rightly brought.

Mr. *Fry*, Q.C., and Mr. *H. A. Giffard*, for the appellant: As to the preliminary objections taken by the respondent: The agreement of the 4th of June, 1870, was a distinct agreement, the validity of which when disputed could not be put in issue and tried upon its merits in the then pending action. The causes of action sought to be enforced in the two actions are different, and a plaintiff can only be put to elect between two proceedings where the two proceedings are directed to enforce the same cause of action. *Moreover, the appel- [248 lant had done nothing in the first action to render it inequitable that he should maintain the second. From the date of the letter of the 11th of June down to this appeal, the appellant was always ready and willing to accept the compromise and carry out its terms. He was ready and willing to desist from the first action on payment of the amount mentioned in the "transaction." It was not obligatory upon him

to dismiss his bill, or to discontinue his action, which under the Code must be with costs; he must "desist" from it, that is, he must not go on with it. In fact he has taken no step in it after the compromise, except for the purpose of enforcing the compromise. Besides, the payment of money by the respondent was a condition precedent to any final order or final stay of proceedings in the first action. Although the court in that action refused to give effect to the compromise, and allowed the respondent to plead, that does not render the invalidity of the compromise *res judicata*, nor does it preclude the appellant from enforcing the same in the second action. The "transaction" was intended as a final settlement of the then pending action. It was not, as contended for by the respondent, a draft of a judgment to be submitted to the court, called a "jugement d'expédient," from which both parties were entitled to withdraw until it was ratified by the court. The old French law on that subject has no application. There is nothing in the Civil Code of Canada referring to jugement d'expédient. This was an ordinary "transaction" and bound the parties: see sect. 1918 of the Civil Code of Canada. As to its being executed on a Sunday—[Mr. Bompas: I do not insist upon that.]

Mr. Bompas, and Mr. Kenelm Digby, for the respondent: Assuming this "transaction" to be valid, still this action is not maintainable. The two causes of action are mutually exclusive: *Merlin, Question de Droit, vo. "Option,"* sect. 1, No. 5. Actual discontinuance of the first action was a condition precedent to the right to payment, and to the right to bring second action. [SIR JAMES W. COLVILLE referred to *Daloz, Juris. Général, vo. Désistement.*] There is a distinction between actions for specific performance and actions for damages; in the former actual performance of his part by the plaintiff, not merely readiness to perform it, is required: 249] *see Civil Code of Canada, sect. 1065: *Perreault v. Arcand* ('). The appellant could at any time have discontinued his suit, and so performed his part of the agreement: see Code of Civil Procedure, "On Discontinuance," sect. 450, *et seq.* Here the intention of the parties was that there should be a judgment in terms of the consent. The Code has taken pains to enable courts to do complete justice in a single suit, and even to provide for the adjudication of claims by and against third parties: 4th chap. of Civil Procedure Code, "Incidental Demands," sects. 149-153. The object is to prevent circuity of actions. That being the object of the judgment of the court below, and the point being one of

(') 4 Low. Can. Jur., 449.

practice, this court will not advise its reversal. [Mr. *Fry*, Q.C., referred to sect. 151.] Time was of the essence of the contract.

Mr. *Fry*, Q.C., in reply, referred to *Askew v. Wellington* (*) to show the practice of the Court of Chancery in a matter of this kind.

SIR ROBERT P. COLLIER stated that their Lordships considered that the case should be argued upon its merits.

Mr. *Fry*, Q.C., and Mr. *Giffard*, for the appellant: First, whether Mr. Laflamme had authority to bind the appellant. According to the law of France there was a binding contract between the parties, unless the appellant refused to ratify it; a reasonable time for his ratification must have elapsed before the respondent could revoke his consent: see Touillier (5th ed.), *Droit Civil Français*, vol. vi., p. 33; where you contract with a person who affects to act for another, you must give a reasonable time to the unnamed principal to ratify or not, as he thinks fit. As to Mr. Laflamme's authority as *avocat et procureur*, apart from a special mandate, to bind the appellant, the authority of counsel in this country was discussed in *Swinfen v. Swinfen* (*). Whoever has the conduct of a case in court has authority, *ex necessitate rei*, to bind his client by a compromise within the limits of the suit: *Story on Agency*, p. 20, art. 24, n.; *Burn's Eccl. Law*, plac. 4, *131st canon, tit. "Advocate." The [250 Code Napoléon restrains the *procureur's* authority: Dalloz, *Général Jurisp.* tit. "Désaveu," sect. 92; Merlin, *Question de Droit*, tit. "Désaveu," "Désaveu d'avoué." See Canada Code of Civil Procedure, "Disavowal," sects. 192, 199. As to the necessity for an express authority in writing, see Civil Code, arts. 1233, 1730; Merlin's *Répertoire de Jur.* "Mandat," Troplong's *Droit Civil expliqué*, vol. xvi. "Du Mandat," 101, 102.

Secondly. Was this "transaction" signed under circumstances which prevent the court from enforcing it. The respondent had failed to prove that he signed under any surprise, or because of any misrepresentation, or under any error of fact or of law: *Attwood v. Small* (*).

For authorities as to the binding effect of this "transaction," see Canada Civil Code, sects. 1920, 1921; Troplong's *Droit Civil expliqué*, vol. xvii., p. 651, sect. 135, tit. "Des Transactions."

Mr. *Bompas*, and Mr. *Kenelm Digby*, for the respondent:

(*) 9 Hare, 65.

(*) 6 Cl. & F., 447; see judgment of

(*) 25 L. J. (C.P.), 308 (1856); 26 L. J. Lord Brougham. (C.P.), 97 (1857).

There is no legal evidence of Mr. Laflamme's authority to bind his client; the want of it was insisted upon from the first. As to the implied authority of an attorney, it is limited strictly to taking steps in the suit. See Civil Code, sect. 1703. See Guyot's *Répertoire de Juris*, vol. xvii., p. 235, tit. "Transaction;" Dalloz, *Gén. Jur.* tit. "Transaction," art. 4, sect. 57; Pigeau, *Pr. Civ.*, vol. i., p. 359. Upon the question of proof of the alleged authority, *Little v. McKeon* (*) shows that it is not an approved course in Canada to call an attorney as a witness on behalf of his client; so that no inference can be drawn against the appellant from his advocates not having been called to show that they were misled. And as a general principle no evidence of the alleged authority is admissible unless it be in writing. See Pothier's "Mandat," I., sect. 3, arts. 29, 30; Guyot, "Mandat," p. 233; Merlin's *Rep.*, tit. "Mandat;" Troplong, "Mandat;" *De Malart v. Martin*; Dalloz, *Jurisp. Gén.* (1860), p. 114.

This "transaction" was not a final contract until confirmed by the court. It was subject, moreover, to a revocation, and 251] was *revoked by the respondent before it was so confirmed. Even if Laflamme had authority to bind his client, subject to his ratification, still a reasonable time had elapsed during which the appellant failed to ratify it, and thereupon the respondent was at liberty to revoke his consent, which he elected to do. See Pothier, *Traité des Oblig.* sect 801; 1 Pigeau, p. 359. As to the invalidity of the transaction, see Dalloz, *Juris. Général*, tit. "Transactions," 155; Story's *Equity Jurisp.*, art. 131.

Mr. Fry, Q.C., replied: He referred to Troplong, "Mandat," sect. 295; Beaubien, *Tr. des Lois Civ. du Bas-Canada*, p. 48; Pigeau, vol. i., p. 348; *Trigge v. Lavallée* (†); Troplong, "Transactions," p. 651; *Lucy's Case* (‡).

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER: In order to make this case intelligible a short narrative is necessary. General Napier Christie Burton, who possessed property in England and in Lower Canada, made his will on the 20th of December, 1834, the provisions of which material to the cause are as follows: He gave and bequeathed the lease of the house in England, in which he then resided, and all his household furniture, plate, &c., and all his other effects, together with all cash in the house at the time of his decease, together with all moneys due to him, in his own right, as well as representa-

(*) 3 Rev. de Jur., p. 366.

(†) 13 Low. Can. Rep., 132.

(‡) 4 D. M. & G., 356.

tive and heir-at-law of his late father General Gabriel Christie Burton, to three trustees (George Burton Hamilton and William Henry King, gentlemen residing in England, and Edmé Henry, described as of La Prairie near Montreal, Lower Canada) in trust for investing the moneys collected and the proceeds of the sale of the furniture, &c., in government stocks, and accumulating such stocks and dividends, "until," in the words of the will, "Christiana Harmar, the only child of my natural daughter, Mary Harmar, shall attain the age of twenty-one years, or day of marriage, whichever shall first happen, and then I do direct my said trustees, or the survivors or survivor of them, or the executors of the survivor, to assign and transfer the whole of such accumulated principal fund or stock, *and all dividends [252 thereon, unto the said Christiana Harmar for her absolute use and benefit . . . but in case the said Christiana Harmar should die before attaining the age of twenty-one years, or being married, or the transfer of the accumulated stock being made to her, then I do give and bequeath the same unto Henry John Styring King, the eldest son of the said William Henry King, his executors, administrators, and assigns absolutely for his or their use and benefit," and he directed his trustees to assign the same accordingly.

In a subsequent part of the will he bequeathed the residue of his estate and effects to Christiana Harmar absolutely on her attaining the age of twenty-one years, but in the event of her dying under age to Henry John Styring King.

By a codicil dated the 23d of December, 1834, he directed Edmé Henry to sell his dwelling-house and land adjoining in Lower Canada, to deduct out of the purchase-money all that might be due to Henry for the expenses of the sale, and his trouble in collecting the rents of the house and of the real estates and seigniories of the testator in Canada, and then to pay over to the other trustees "the balance of such purchase-money, and of all other moneys and rents due to me which have or may come into the hands of the said Edmé Henry or his heirs in manner aforesaid, in order that the balance may be invested in government stock in England, upon and for the same trusts and persons to whom I have in the said will bequeathed the rest and residue of my estate and effects."

The testator died in January, 1835.

Christiana Harmar died in April, 1847, at the age of twenty-two years, unmarried.

On the 31st of December, 1839, Edmé Henry, the Canadian executor, with the consent of his English co-executors, sold,

by deed of that date, to Pinsoneault, the defendant, a relative of his, the uncollected rents of the seigniories of the testator in Canada for a sum of £1,999.

On the 18th of December, 1869, nearly thirty years after the above-mentioned transaction, Henry John Styring King filed a declaration in an action against Pinsoneault and George Burton Hamilton, the last surviving executor and 253] trustee of the testator, *in which he set out the will without the codicil, averred that Christiana Harman had died under age and unmarried, and before any transfer to her; that Edmé Henry had fraudulently concealed from his co-executors the amount of the uncollected rents due to the testator, which amounted to £50,000; that by false representations of Henry and Pinsoneault the other executors were induced to agree to the sale to Pinsoneault; he prayed that the deed of the 31st of December, 1839, should be cancelled, that Pinsoneault should account for all the arrears with interest and profits, or in default should pay to him \$480,000. On the filing of the declaration a burial certificate was filed with it, wherein it is stated that at the time of her death Miss Harmar was aged twenty-two.

This action was brought when the defendant and his family were in Europe, intending to take a lengthened tour. The statement that Miss Harmar died under age is admitted by Mr. Laflamme, the advocate and attorney of the plaintiff, to have been false to his knowledge, and inserted in the declaration by him to prevent its being demurrable. If the plaintiff's right to sue, as it is now contended for, had been stated, viz., that notwithstanding Miss Harmar attained her majority, nevertheless the gift over to the plaintiff took effect because no transfer had actually been made to her, the declaration might have been met by a demurrer, upon the argument of which the plaintiff's right to sue could have been decided without an enquête being necessary if the decision had been against him, and the defendant's presence in Canada might not have been required. It has been suggested that the object of this false statement was to compel the plaintiff's return to Canada, to work on his fears by the prospect of an inquiry into transactions thirty years old, and to drive him to a compromise. Be this as it may, Mr. Pinsoneault when he heard of the action hastened to Canada, and arrived at Montreal on the 25th of May, 1870. Communications took place between his legal advisers and those of the plaintiff, in the course of which a proposition for settling the action for \$30,000 was discussed. Mr. Pinsoneault, however, states that on Saturday, the 4th of June, he had

determined to plead to the action, and had given instructions for that purpose. On that same 4th of June Mr. Laflamme obtained a foreclosure of the *pleadings in the [254 suit. The defendant, probably more alarmed than he need have been at this procedure, went to Mr. Laflamme (who had been a personal friend of his) on the Sunday morning without consulting his attorney or counsel, and in the course of the day the following document was drawn up by Mr. Laflamme:

“Henry J. S. King, plaintiff, and Alfred Pinsoneault, defendant.

“Memorandum.

“It is agreed that this case is to be settled upon the following terms, viz.:

“1. The defendant is to pay to the plaintiff \$30,000 in full settlement of the action, which is to be at once desisted from, the defendant paying costs to the amount of \$50.

“2. Of the above sum of \$30,000, \$15,000 shall be paid immediately, and the remaining \$15,000 shall be invested in hypothèques, or other approved securities, in the joint names of H. Cotté and Thomas W. Ritchie, Esquires, in trust to pay the interest upon such investment during the period extending from this date to the 31st of December, 1877, to the plaintiff, at the rate of 5 per cent. per annum, payable semi-annually, and to transfer the capital to him (the plaintiff) or his representatives at the expiration of that time, provided no action shall have been brought by the representatives of the late Christiana Harmar against Mr. Pinsoneault or his representatives for or in respect of any of the rents, moneys, or matters or things mentioned in the declaration of this cause, or under and in virtue of the will of the late General Christie; and provided any such action has been brought that it shall have been finally dismissed or disposed of; and if any such action is instituted, then Mr. Pinsoneault shall pay the interest of 5 per cent. to the said trustees, who shall deposit the same under the above trust to await the final decision of this action.

“3. If at the expiration of the said time (on the 31st of December, 1877) such an action shall be pending, the capital shall only be paid upon the same being finally dismissed.

“4. If such action shall be brought within the said period of seven years, and shall be finally decided against Mr. Pinsoneault, the investment of the said sum of \$15,000 shall be transferred to Mr. Pinsoneault, together with the interest added thereto.

1875

King v. Pinsoneault.

J.C.

255] *"5. If Mr. Pinsoneault prefers it, the sum of \$15,000 may be deposited in any chartered bank of this city selected by him, in the names of Mr. Cotté and Mr. Ritchie, subject to the foregoing trust.

"Montreal, June 4, 1870.

"(Signed), Alfred Pinsoneault.

"R. Laflamme,

"Attorney for the said J. S. King."

This agreement, which, in the language of the Canadian law, is termed a "transaction," though made on the 5th of June, is dated on the 4th. Mr. Laflamme, after the signing of the agreement, gave the defendant a letter addressed to Mr. Cassidy, his counsel and attorney, to the effect that the cause was stayed and the foreclosure removed "jusqu'à nouvel avis."

Mr. Laflamme deposes that he had authority from the plaintiff to enter into this agreement, and that he so informed the defendant; and it is manifest that the defendant at the time supposed that he had such authority.

On the next day the defendant's legal advisers satisfied him that the agreement he had made was an improvident one, and intimated their opinion that the plaintiff had no cause of action.

On the 10th of June the defendant executed a notarial instrument revoking the agreement on the ground (among others) that it had not been accepted by the plaintiff, which instrument was served on that day on Mr. Laflamme.

On the 11th of June the plaintiff wrote and sent a letter to the defendant, notifying that he was prepared to carry out the agreement and to desist from the action on the payment of the \$30,000 as therein provided.

From this time the plaintiff attempted to enforce the compromise, and the defendant to resist its enforcement, by all means in their power.

The defendant sought to put in pleas to the action, and succeeded in spite of the plaintiff's opposition on the ground of the settlement.

The plaintiff prayed for judgment in the action in the terms of the compromise, but this was refused on the ground that the defendant had been admitted to plead.

In January, 1871, the plaintiff commenced a fresh action 256] on the *agreement or "transaction" of the 5th of June, 1870, averring his own readiness to perform it, and offering to perform it, and praying that the defendant might be compelled to perform it. This action is the subject-matter of the present appeal.

The main grounds of defence raised by the pleas to the action were in substance :

1. That the action was not maintainable during the pendency of the original action, because they were for substantially the same cause ; or, if that were not so, that the discontinuance of the first action was a condition precedent, under the "transaction," to the bringing of the second.

2. That the proceedings by which the defendant had been admitted to plead in the original action, and the motion of the plaintiff for judgment in terms of the compromise had been rejected, were, in effect, a judgment adverse to the plaintiff's right to enforce the "transaction."

3. That the "transaction" was not intended to be final, but to be conditional on its ratification by the court.

4. That Mr. Laflamme had not authority to make it.

5. That the defendant was entitled to be relieved from it on the ground of mistake or surprise or fraud.

The three last, with some other grounds, were taken by the same (the third) plea.

These questions after a multiplicity of pleadings and interlocutory proceedings which it is needless to particularize further, came before the Superior Court, when judgment was pronounced by Mr. Justice Beaudry.

That judgment is to the effect that the pendency of the first suit is not a bar to the maintenance of the second, and that the defence in the nature of *res judicata* raised by the second plea also failed, but that the suit should be dismissed on the ground that Mr. Laflamme had not sufficient general authority, as attorney and counsel in the case, to bind his client by the agreement in question, and that no special authority had been proved, and that the ratification by the plaintiff of the 11th of June, after the defendant's repudiation of the 10th, was too late.

On appeal to the Court of Queen's Bench that court held :

1. That the second action was not maintainable as long as the first was pending.

*2. That although the plaintiff might have enforced [257 the "transaction" in the first action, he had not done so by the proper pleading.

The reasons of this judgment are thus stated by Chief Justice Duval :

"I express no opinion on the validity of the settlement pleaded, but I hold that no separate action can be brought on it *pending* the first action instituted. King ought to have discontinued his first action brought, before instituting

the present, or to have pleaded this as an *incident* to the first."

The court thereupon confirmed the judgment of the court below, but not for the reasons therein alleged, "reserving liberty to the defendant to resort to any means he may be advised for the purpose of putting in force the transaction."

In giving this judgment the court was far from being unanimous.

Judges Taschereau and Monk dissent from it, holding that the action was maintainable, and that the plaintiffs were entitled to succeed upon the merits. The judgment is that of Chief Justice Duval, Judges Polette and Badgley, the latter of whom, though subscribing to the judgment, and holding that the action was not maintainable pending the former action, doubts whether "the transaction" was not properly pleaded in the first action, and, expressing a regret, in which their Lordships sympathize, that the court having all the evidence before them for deciding the merits should feel themselves unable to do so, gives his own opinion in favor of the defendant.

Their Lordships concur with the Superior Court and with Judges Taschereau and Monk that the pendency of the first action was not a bar to the institution of the second.

The actions were not for the same cause. The first action was brought against Pinsoneault and Hamilton, for the purpose of setting aside a deed of 1839, and obtaining an account of the full amount of the sums received by Pinsoneault with payment thereof; or, in default of such account and payment, for damages. The second action was brought against Pinsoneault alone to enforce an agreement of 1870, 258] and not only to obtain payment of a sum of *money, but to enforce the settlement of another sum upon trusts wholly outside of and collateral to the first action. Nor was the discontinuance of the first action a condition precedent under the agreement to enforcing that agreement by action. The performance by the parties of their parts of the agreement respectively, were, in their Lordship's opinion, concurrent conditions, and this being so, it was sufficient for the plaintiff to aver in his declaration that he had been and was ready and willing, and that he offered to perform his part, viz., discontinuance of the first action on the defendant performing his part of the agreement. Their Lordships are further of opinion that he has taken no step inconsistent with this averment, and they find that it is proved in fact.

Although the forms of procedure differ in England and

Canada, some observations of the Vice-Chancellor Turner in *Askew v. Wellington* (1) are applicable in principle and in reason to the present suit. The Vice-Chancellor observed that some cases which he referred to "appear to establish that at least in cases where the compromise goes beyond the ordinary range of the court in the existing suit, and the right to enforce the agreement in that suit is disputed, the proper course of proceeding for enforcing it is by bill for specific performance, and not by motion or petition in the original suit to stay the proceedings, and I think that, *a fortiori*, this must be the case where the agreement itself is disputed." It may be collected that the putting an end to the original suit in that case was not deemed a condition precedent to instituting the second.

It becomes, therefore, unnecessary to decide whether or not the plaintiff could have enforced the "transaction" in the first action, or whether, if he could, he has taken the proper steps for doing so.

For these reasons their Lordships are of opinion that the Court of Queen's Bench were wrong in declining to give judgment on the validity of "the transactions;" it becomes, therefore, their Lordships' duty to determine this question, and to give the judgment which ought to have been given by the Court of Queen's Bench.

The objection that the "transaction" was not intended to be final, but was subject to some act of confirmation by the Court, is not noticed by Mr. Justice Beaudry, who [259 seems to have thought his finding on the want of authority sufficient to establish the third plea and to dispose of the suit. Their Lordships have no doubt that it was intended to be final.

The next important question that arises is whether or not Mr. Laflamme had authority to bind his client by it.

This question again divides itself into two:

1. Had Mr. Laflamme such authority by reason of his being counsel and attorney (*avocat* and *avoué*) in the case?
2. If not, had he express authority from the plaintiff?

Their Lordships do not consider it necessary or desirable for the determination of the first of these questions, to inquire into the extent of the authority to settle causes of counsel, attorneys, or proctors in this country, founded, as it is, upon laws and customs in a great degree peculiar to ourselves. The law on this subject must be looked for in the Canadian Code, interpreted, if its provisions are ob-

(1) 9 Hare, 65.

scure, by the aid of what light can be thrown upon them by the French law.

Mr. Justice Badgley, in his learned judgment, intimates an opinion (as their Lordships understand him) that the "transaction" was invalid because it was not given effect to by a "jugement d'expédient," and in support of this view he quotes the following passage from Pigeau (*Procédure Civile*, vol. i., pp. 9 and 359):

"On peut transiger en justice en passant un jugement de concert qui ordonne ce dont les parties sont convenues; cela se fait très-fréquemment au Châtelet de Paris où l'on appelle cette voie expédient. On dresse le dispositif du jugement sur papier ordinaire, les procureurs le signent et le font signer à leurs cliens, lorsqu'ils n'ont pas de pouvoir de ceux-ci, et ne veulent pas prendre sur eux de signer sans pouvoir, à cause de l'importance de l'affaire."

The "transaction" by "jugement d'expédient," with its formalities, which was only one form of "transaction" according to the French law, has not been adopted or recognized in the Canadian Code, which does not require that a "transaction" shall be in any particular form, even if it consists in assenting to a judgment. The passage from 260] Pigeau, however, is not unimportant as bearing on *the general authority of procureurs—for if they have not authority to consent to a judgment, it may be argued that they cannot have the power to settle a cause, and to abandon or compromise the rights of their clients without one.

Mr. Lafamme was both "avocat" and "avoué." It does not appear, however, that the law gives him any greater authority in his former than he had in his latter capacity. If he had any power analogous to that of a counsel in England, to settle a cause "in court," it is enough to say that it was not this power which he exercised; his power was merely that of an "avoué."

No French authority has been cited which goes the length of asserting that an "avoué" has a general power to bind his client by a "transaction" such as the present, and some French authorities have been cited which it is contended establish the negative of this proposition.

Much reliance has been placed by the counsel for the defendant on a passage from Dalloz's *Répertoire de Jurisprudence* ("Transaction," art. 4, s. 57), which runs thus:

"Un mandataire a-t-il le droit de transiger au nom de son mandant? La négative résulte clairement de l'Article 1988, Code Nap., à moins que la procuration ne confère expressé-

ment ce pouvoir au mandataire. Le mandataire chargé pour une seule affaire ne peut transiger sans un pouvoir exprès.”

Article 1988 of the Code Napoléon is almost identical with article 1703 of the Canadian Code, which is in these terms :

“The mandate may be either special for a particular business, or general for all the affairs of the mandator. When general it includes only acts of administration. For the purpose of alienation or hypothecation, and for all acts of ownership other than acts of administration, the mandate must be express.”

It has been argued that if the inability declared by the French Code to alienate and hypothecate without express powers carried with it the inability to “transact,” the same words in the Canadian Code must have the same effect.

The plaintiff seeks to explain this passage as referring only to the powers of ordinary mandatories, and having no reference to “avoués,” who are mandatories with extraordinary and exceptional powers. If, however, a [261] class of mandatories so well known do possess this exceptional power, the omission of all notice of it in the place where notice of it would have been appropriate, or, indeed, in any part of the exhaustive treatise of Dalloz concerning “Transactions” is not a little remarkable.

The same doctrine is laid down in other books of authority.

In Guyot’s *Répertoire de Jurisprudence* (vol. xvii. “Transaction,” p. 235), this is said :

“Un procureur ou mandataire peut-il transiger au nom de son commettant? Il le peut sans difficulté, si la procuration lui eût donné expressément le pouvoir ; mais dans le cas contraire toute espèce de transaction lui est interdite.”

The same doctrine is laid down by Troplong (*Droit Civil expliqué*, s. 295), and by other writers on French law, without the supposed exception being ever noticed.

Undoubtedly “avoués” possess some powers beyond those of ordinary mandatories of binding their principals, unless their acts are expressly disavowed.

This subject is treated of at some length in Dalloz’s *Répertoire de Jurisprudence* (“Désaveu,” s. 3, art. 25) where many instances of such powers are given, not, however, including the power “to transact.” It is also treated more succinctly in Dalloz’s *Dictionnaire de Jurisprudence*, tit. “Désaveu.” It is there said that in general every act of a

mandatory is void which exceeds the bounds of his mandate, but that it is otherwise with mandatories *ad litem*, who are in some sense officers of justice representing citizens before the tribunals in the exercise of their profession. He thus sums up the law: "En effet, jusqu'à désaveu tout acte de ministère de l'avoué, mandataire *ad litem*, quelles que soient les conséquences qu'il entraîne, est réputé fait en vertu du pouvoir de sa partie."

It appears to their Lordships that full effect may be given to the meaning of these expressions by treating the "avoué" as able to bind his client (until "désaveu") by any *proceeding in the cause*, though taken without his client's authority, or even in defiance of his prohibition. The plaintiff is assumed to have authorized every claim made on his behalf in the declaration, the defendant every plea pleaded for him; for 262] example, a plea of the *Statute of Limitations, or a plea justifying a libel—though he may have prohibited their being pleaded. An illustration of this doctrine is afforded in the present case, where the plaintiff must be taken to have authorized his claim being based on a false statement of the age at which Miss Harmar died, although he may possibly have disapproved of it. Such would appear to be the view taken of this subject by the framers of the Canadian Code of Procedure, article 194 of which is in these terms:

"A disavowal can only be made by the party himself or his attorney, under a special power, and the party himself must declare that he did not authorize the *act of procedure* which he repudiates."

Their Lordships are of opinion that to enter upon an agreement such as "the transaction" in question, which was in a great measure collateral to the cause, and was capable of being made the subject-matter of a separate suit, cannot be properly termed an act of procedure in the cause.

Their Lordships have not discovered in the Canadian Codes any provision conferring upon "avoués" the power of entering into transactions if they did not before possess it. The subject of "mandate" is treated of under the 8th title in five chapters.

Article 1703, which has been above referred to, applied to all mandatories general and special.

Article 1704 is in these terms;

"The mandatory can do nothing beyond the authority given or implied by the mandate. He may do all acts which

are incidental to such authority and necessary for the execution of the mandate."

And the application of this rule to professional men of various classes, including "avoués," is provided for by article 1705 :

"Powers granted to persons of a certain profession or calling to do anything in the ordinary course of business which they follow need not be specified, they are inferred from the nature of such profession or calling."

The only mention of "avoués" in the chapter is contained in article 1723 :

"Advocates, attorneys, and notaries are subject to the general *rules contained in this title ("mandat") in [263 so far as they can be made to apply. The profession of advocate and attorney is regulated by the provisions contained in an act intituled 'An Act respecting the Bar of Lower Canada.'"

It has been admitted that the power contended for is not to be found in this act.

There are nine articles in the Code under the head "transaction," none of which appear to have any material bearing on the subject now under discussion.

It does not appear to have been the intention of the framers of the Code to invest "avocats" or "avoués" with any new or exceptional powers, but rather to apply to them the general law with respect to mandatories as far as it was applicable.

In their Lordships' opinion Mr. Laflamme had not authority, by reason of his being "avocat" and "avoué," to bind his client by this "transaction."

If this be so, the next question is, whether any special authority to make this "transaction" has been proved? It has been admitted that such special authority need not have been in writing.

The evidence relied upon by the plaintiff on this subject is to be found in an affidavit made by Mr. Laflamme in the original suit, which may be referred to, inasmuch as it has been put in evidence by the plaintiff, in which Mr. Laflamme states: "The defendant then and there signed the same" (the transaction), "together with this deponent, on behalf of the plaintiff, *by whom he was fully authorized.*" And in his deposition as a witness for the defendant, "Je lui dis alors ce que mon client consentirait à accepter, que j'étais autorisé à régler sur ces bases." No questions were put to Mr. Laflamme by the plaintiff.

In their Lordships' opinion these allegations are consistent with a belief which Mr. Laflamme may have *bona fide* entertained, that his character of "avoué" gave him authority to conclude the "transaction." Mr. Laflamme must have been aware of the importance to his client of proving a special authorization, and if such had been given, he might and probably would have been called by the plaintiff to prove it. Called by the defendant, he might still have proved 264] it by putting in the written authority, if *the authority were in writing, or, if it were given by a verbal communication, by stating the effect of that communication, and where and when it was made. But Mr. Laflamme makes no mention of any special authority, and in the absence of such mention their Lordships cannot assume it.

There being no evidence of special authority, it becomes unnecessary to deal with the argument on the part of the defendant, that although the special authority need not have been in writing, still that the proof of it, or, at all events, the commencement of proof, must have been in writing, and that no such commencement has here been shown.

It has been contended further, on the part of the plaintiff, that even assuming Mr. Laflamme not to have been authorized, still the defendant, having treated him as authorized, could not resile from his agreement, until a reasonable time had elapsed for the ratification of Mr. Laflamme's act by his principal; and, in support of this proposition, a passage from Toullier has been quoted. It is enough to say that, assuming this to be Canadian law, of which their Lordships are by no means satisfied, in their opinion more than a reasonable time for ratification of the "transaction" by the plaintiff had elapsed before it was repudiated by the defendant.

The decision which their Lordships have come to on the question of authority disposes of the case. It therefore becomes unnecessary to determine the further question which would have arisen had their decision on this point been otherwise, whether the defendant is entitled to relief from the agreement on the ground of mistake, surprise, or fraud, and their Lordships are spared a somewhat painful investigation into many circumstances which it has been unnecessary to notice.

Their Lordships will humbly advise her Majesty to reverse the judgment of the Court of Queen's Bench, except so far as it affirms that of the Superior Court, and condemns the appellant in the costs of the appeal; and to direct that that

appeal do stand dismissed and the judgment of the Superior Court affirmed in all respects with the costs of this appeal.

Solicitors for the appellant: Messrs. *Ranken, Ford & Co.*

Solicitors for the respondent: Messrs. *Bischoff, Bompas & Co.*

For a valuable collection of cases as to authority of an attorney, see *Livingston's Law Magazine*, January, 1856, p. —; 11 Abb. Prac., 306 note.

The authority of an attorney in a court of record is *presumed*: *Osborn v. U. S. Bank*, 9 Wheaton, 788.

But an appearance by attorney is merely presumptive evidence of his authority and may be rebutted: *Allen v. Stone*, 10 Barb., 547; *Porter v. Bronson*, 19 Abb. Prac. Rep., 236.

See note, 10 Eng. Rep., 502; *Porter v. Bronson*, 19 Abb. Prac. Rep., 236.

And by virtue of his authority and power as an attorney in the action, he may demand an assignment of choses in action under the non-imprisonment act, and institute new and separate proceedings thereunder: *Steward v. Biddecum*, 2 N. Y. Rep., 103.

But an attorney employed merely to take measures for distraining, cannot give the notice and make the affidavit of rent due under 1 R. S., 746, § 12,—especially if he knows nothing of the facts except from hearsay: *Bussing v. Bushnell*, 6 Hill, 382.

In England it has been held that an attorney has authority to compromise an action if he acts *bona fide* and with reasonable care and skill, and the settlement is not made in defiance of the client's instructions: *Chow v. Parrott*, 14 C. B., N. S., 74; *Pristwick v. Poley*, 18 C. B., N. S., 806; *Strauss v. Francis*, L. R., 1 Q. B., 379.

And see *Thomas v. Hewes*, 2 Comp-ton & Meeson, 519.

And so in Ireland, *Brady v. Curran*, Irish Rep., 2 Com. L., 314; *Berry v. Mullen*, Irish R., 5 Eq., 368.

Even after judgment if the attorney be retained to obtain satisfaction of the judgment: *Butler v. Knight*, L. R., 2 Excheq., 109.

Otherwise after judgment unless he be further retained in the action: *Egan v. Rooney*, 38 How. Prac., 121; *Lewis v. Woodruff*, 15 How. Prac., 539.

But see 1 Hill, 656, 1 Wait's Prac., 242; *Chat. Co. Bank v. Risley*, 4 Denio, 480.

A solicitor as a counsel has full authority to either compromise or abandon the claims of his client, provided it be in a matter within the scope of the suit: *Bacon, C. J.* in *Bankruptcy*, 21 Weekly Reporter, 104.

So a counsel may consent to the withdrawing of a juror: *Strauss v. Francis*, L. R., 1 Q. B., 379.

And if a client be present during a compromise it will not be set aside on his allegation that he did not understand what was going on: *Chambers v. Mason*, 5 C. B., N. S., 59.

But if the attorney is expressly instructed not to compromise a suit, a settlement by him is void and not binding upon the client even though reasonable and *bona fide* and for the benefit of the latter: *Fray v. Voules*, 1 Ellis & Ellis, 839.

If the attorney is authorized to compromise only on condition of securing for his client a certain sum, that (coupled with the fact that he afterwards compromised the suit on payment of a larger sum, and professed to have compromised it in pursuance of that authority) may be evidence of an agreement upon his part to accept the surplus of the money paid over the net sum his client expected to receive in satisfaction of his costs, not only as between party and party, but between attorney and client: *Churchyard v. Watkins*, 27 L. J. Excheq., 13.

In New York it is settled that an attorney, as such merely, cannot settle a suit and give a release concluding his client in relation to the subject in litigation: *Barrett v. Third Ave., etc.*, 45 N. Y., 628, affirming 8 Abb. Prac., N. S., 205; *Shaw v. Kidder*, 2 How. Prac. 244; see note, 11 Abb. Prac., 74-7.

So in Maryland, *Maddux v. Bevan*, 39 Maryland, 485.

Nor can he satisfy a judgment or release one defendant without payment: *Beers v. Hendrickson*, 45 N. Y., 665; *Carstens v. Barnsdorf*, 11 Abb. Prac., N. S., 442; see note 11 Abb. Prac. Rep., 74-7; *Benedict v. Smith*, 10 Paige, 126; *Livingston v. Radcliff*, 6 Barb., 201.

1875

King v. Pinsoneault.

J.C.

Though the attorney would be personally liable upon such an agreement: *Carstens v. Barnsdorf*, 11 Abb. Prac., N. S., 442.

Nor can he accept payment in anything but the full amount of money: *Maddux v. Bevan*, 39 Maryland, 485; *Lewis v. Woodruff*, 15 How. Prac., 539; see *People v. Mayor*, 11 Abb. Prac., 74-7 note.

Nor discharge a defendant from imprisonment: *Jackson v. Bartlett*, 8 Johns., 361; *Kellogg v. Gilbert*, 10 Johns., 220; *Simonton v. Barrell*, 21 Wend., 362; 11 Abb. Prac. Rep., 75 note.

Silence by the client may however be construed as a ratification of the act of his attorney or counsel: *Maddux v. Bevan*, 39 Maryland, 485; *Brown v. Platt*, 8 Bosw., 324.

Otherwise if promptly repudiated: *Lewis v. Woodruff*, 15 How. Prac. Rep., 539.

Nor has a counsel authority to execute a release to a witness: *Browne v. Hyde*, 6 Barb., 392.

Nor has an attorney power to release an endorser: *East River Bank v. Kennedy*, 9 Bosworth, 543.

An attorney has no power to do an act which will release a proper and valid lien in favor of his client upon real estate: *Banks v. Robb*, 4 Brewster, 106.

Or which will release sureties to an undertaking on appeal: *Quinn v. Lloyd*, 30 How. Prac., 378.

He has to stipulate that death shall not abate an action which would otherwise abate: *Cox v. N. Y., etc.*, Court App. Dec. 14, 1875, reversing 6 N.Y. Sup. Ct. Rep., 405, 4 Hun, 176; see also *Anderson v. Rome, etc.*, 54 N.Y. 335, 343.

An attorney has no power to assign the claim or judgment of his client: *Mayer v. Blease*, 4 South Carolina Rep., N. S., 10.

Nor to bid for his client at an execution sale: *Beardsley v. Root*, 11 Johns., 164; *Hunley v. Cramer*, 4 Cowen, 717; *Aerill v. Williams*, 4 Denio, 295.

Nor to consent that money, taken from his client on arrest, shall be paid into the treasury as security for his client's appearance, or for any purpose: *City, etc.*, v. *Heiland*, 67 Illinois, 278.

The courts have held where the party is not served with process, but an attorney appears for him, and so where an attorney, without authority from a

party, commences a suit in his name, the party is not bound thereby: *Allen v. Stone*, 10 Barb., 547; *Williams v. Van Valkenburgh*, 16 How. Prac. Rep., 144; *Bates v. Voorhees*, 20 N.Y., 525, 528; *Ellsworth v. Campbell*, 31 Barb., 134; 1 Wait's Prac., 243.

But see in England *Murdy v. Newman*, 1 Crompt., Mees. & Roscoe, 402, and note to Johnson's 4th ed.

If the bringing of a suit be not authorized by the plaintiff, the defendant will be allowed a stay thereof: *Town, etc.*, v. *Cole*, 3 N. Y. Supreme Court Rep., 431.

Where process is served upon the party he will ordinarily be bound by the appearance of an attorney without collusion, if he be responsible: *Allen v. Stone*, 10 Barb., 547; *Everson v. Gehrman*, 1 Abb. Prac., 173-5.

But see *Ellsworth v. Campbell*, 31 Barb., 134.

Until the attorney is superseded: *Hamilton v. Wright*, 37 N. Y., 502; *Blodgett v. Conklin*, 9 How., 442; *Everson v. Gehrman*, 1 Abb. Prac., 173-5.

This however is simply the ordinary rule, and the party will be let in to repudiate such appearance, or the negligence of an incompetent attorney, where justice requires, although the attorney be responsible: *Bean v. Mather*, 1 Daly, 441; *Shelton v. Tiffen*, 6 How. U. S. Rep., 183; *Sharp v. Mayor*, 19 How. Prac., 193; 31 Barb., 578, affirming 9 Abb. Prac., 426; 18 How. Prac., 97, 213; *Elston v. Schilling*, 7 Rob., 74; *People v. Mayor*, 11 Abb. Prac., 66; *Ellsworth v. Campbell*, 31 Barb., 134; 1 Wait's Prac., 243; *Blodgett v. Conklin*, 9 How., 442; *Everson v. Gehrman*, 1 Abb. Prac. Rep., 173-5; *Yates v. Horanston*, 7 Robertson, 12.

But see in Missouri, *Gehrke v. Joel*, 59 Missouri, 522.

The remedy however is in the suit in which the unauthorized appearance was had; it cannot it seems be attacked collaterally in the courts of the state in which the attorney appeared: *Brown v. Nichols*, 42 N. Y., 26.

But see 10 Eng. Rep., 502 note, and cases there cited, and *Howard v. Smith*, 42 How., 300; 33 N. Y. Superior Court Rep., 129; S. C., second appeal, 35 N. Y. Superior Court Rep., 131.

As a general rule an attorney has not as incidental to his employment the power to pledge the credit of his client by employing counsel or another attor-

ney as an assistant: *Willard v. Town of Danville*, 45 Vermont, 93; *Mostyn v. Mostyn*, L. R., 5 Chancery Appeals, 457; *Cook v. Ritter*, 4 E. D. Smith, 253; *Matter of Bleakley*, 5 Paige, 311, 313-4; see 2 Greenleaf's Evidence, § 139.

But where the facts in a particular case are such that it may fairly be inferred from them that such an authority was given, the general rule should yield: *Willard v. Town of Danville*, 45 Vermont, 93; *Brigham v. Foster*, 7 Allen, 419.

Where an attorney employs counsel it is a question of fact whether he did not become personally liable for his fees, although for the benefit of his client: *Serace v. Whittington*, 2 B. & C., 11, 9 Eng. C. L. Rep.

But if the client be present at the trial he is liable for services of counsel although there was a secret agreement by the attorney that he would pay them: *Brigham v. Foster*, 7 Allen, 419.

An attorney has authority to refer a cause without any fresh authority: *Faviell v. Eastern, etc.*, 2 Excheq., 344, 2 Dowl. & Lowndes, 64.

See also *Fake v. Smith*, 7 Abbott's Prac. Rep., 108; S. C., 2 Abb. Court of App. Dec., 76; *Tiffany v. Lord*, 40 How. Prac. Rep., 481.

An attorney, by his general authority, may, after judgment rendered, give a stipulation allowing an extension of the time to perfect an appeal: *Hoffenberth v. Muller*, 12 Abb., N. S., 222.

See note, 11 Abb. Prac. Rep., 74-7; 1 Wait's Prac., 241.

Or to make arrangements concerning the progress of a cause, as the putting off of a trial, and the like, without any special authority from the client: *Shaw v. Kidder*, 2 How. Prac. Rep., 244; note, 11 Abb. Prac. Rep., 74-7.

Or discontinue an action: *Barrett v. Third Avenue, etc.*, 45 N. Y., 628; *Gaillard v. Smart*, 6 Cowen, 883; see note, 11 Abb. Prac. Rep., 74-7.

So he has power to open a default which he has taken (properly or improperly) and to vacate the judgment entirely; even though his client has instructed him to the contrary: *Read v. French*, 28 N. Y., 285; 1 Wait's Prac., 241; *Classman v. Merkel*, 3 Bosw., 402; *Anon.*, 1 Wend., 108.

But see *Quinn v. Lloyd*, 7 Robertson, 538; *Phillips v. Wicks*, 38 N. Y. Superior Court Rep., 74, *Quinn v. Lloyd*, 38 How. Prac., 878; *Dencksaar v. McCardsel*, 2 How. Prac., 188.

But not it seems that no appeal shall be taken: *People v. Mayor*, 11 Abb., 66; *Bates v. Voorhees*, 20 N. Y., 525.

[Law Reports, 6 Privy Council Cases, 265.]

J. C. (1) March 9, 16, 1875.

265] *In the matter of the Companies Act, 1864, and the Amending Act, 1870-71, and of the TALISKER MINING COMPANY, LIMITED.

THE BANK OF SOUTH AUSTRALIA, Appellants; and ABRAHAM ABRAHAMS and Others, Respondents.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Power of Directors—Mortgage of Unpaid Capital—Future Calls.

A power in a deed of settlement of a joint stock company authorizing the directors to mortgage or charge the property of the company, does not authorize them to include in such mortgage or charge future calls, or, in other words, the unpaid capital of the company.

Ex parte Stanley (*) approved.

The capital not paid up is, according to the usual forms of deeds of settlement, only *sub modo* the property of the company; a precedent condition to the absolute proprietary right of the company therein being the due making of a call by a resolution of the board of directors.

On the 13th of October, 1862, a joint stock company called the Talisker Mining Company was formed under a deed of settlement bearing that date. This deed of settlement defined the objects of the company, and the terms according to which its affairs were to be carried on, and, amongst other things, by clause 13 thereof empowered a special general meeting of the shareholders of the company "to authorize the trustees and directors, or any of them, to borrow on mortgage or charge of the property of the company, or on the bonds, debentures, loan notes, or promissory notes of the company, or partly on some and partly on others of such securities, or any other securities which may be available, and which the meeting may approve, any sum or sums, so that no sum exceeding £3,000 principal money be due at any one time. . . . And so as no sum or sums of money shall 266] be borrowed by the company until *the whole of the calls (if any) made by virtue of these presents shall be paid up;" and "to amend, add to, or repeal all or any of the clauses or provisions of the deed of settlement of the company which may be in force for the time being, and otherwise to alter the constitution of the company as may be thought proper; provided always, that every alteration in

(1) *Present*: SIR JAMES W. COLVILE, THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, THE LORD JUSTICE MELLISH, and SIR MONTAGUE E. SMITH.

(*) 4 De G., J. & S., 407; S. C., 33 L. T., 536.

or addition to the deed of settlement effected under this power shall be embodied (at any time or times after the same have been effected) in a supplemental deed or supplemental deeds of settlement, which shall be executed by the chairman of the meeting, and shall thereupon become binding and conclusive upon all the shareholders."

By a supplemental deed of settlement of the said company, dated the 10th of April, 1865, duly executed in pursuance of the resolutions in that behalf of two previous special general meetings of the shareholders, it was declared that the capital of the Talisker Mining Company should thenceforth be £30,000 instead of £6,000 as theretofore, and that the amount payable on each share should thenceforth be £10 instead of £2, and that the Talisker Mining Company should be limited by shares, and should be forthwith brought under "the (South Australia) Companies Act, 1864." And it was further declared as follows: "That the power to borrow money, contained in the hereinbefore recited deed of settlement (being the deed of settlement of the 13th of October, 1862), shall be extended from £3,000, as at present, to £10,000, and that such parts of the said deed of settlement as prevent such borrowing until the whole of the calls made shall be paid up shall be and the same are hereby repealed."

The Talisker Mining Company was accordingly, on the 27th of April, 1865, duly registered under the provisions in that behalf of the said Companies Act, 1864, as a company limited by shares, by the name of the "Talisker Mining Company, Limited," and is hereinafter called "the company."

On the 1st of August, 1865, the company duly issued 129 debentures of £25 each, and assigned to loan trustees for securing the same "all those the unpaid calls on 3,000 shares in the company as and when the same should become payable."

By a supplemental deed of settlement dated the 5th of March, 1867, the former deeds were altered so as to increase the *borrowing powers of the company to a sum of [267. £15,000 including all sums already borrowed.

On the 1st of August, 1867, the company duly issued 165 fresh debentures of £25 each, whereof 129 were delivered to the holders of the former debentures in cancelment of the same, and the remainder to persons advancing the sum of £25 in respect of each debenture. A new indenture was also executed on that day of the like effect as the deed dated the 1st of August, 1865.

By a further deed of settlement dated the 17th of July, 1869, it was provided "that the capital of the company shall henceforth be £40,000 instead of £30,000 as heretofore; that the number of shares in the said company shall henceforth be 10,000 shares instead of 3,000 as heretofore; that the amount payable on each share shall henceforth be £4 instead of £10 as heretofore."

On the 1st of August, 1871, the company having paid off 34 out of the 165 debenture-holders mentioned above, duly issued 136 fresh debentures of £25 each, and delivered the same to the remaining holders of the previous debentures in cancelment thereof, and in satisfaction of the arrears of interest due thereon.

The due payment of the said 136 debentures and interest thereon at the rate of £10 per cent. per annum, on the 1st of February, 1872, was secured by an indenture dated the 29th of August, 1871, and made between the company of the first part, the then directors of the company of the second part, and the respondents Breakell and Gordon of the third part, whereby the company (with the concurrence of the directors) assigned unto the respondents all those the unpaid calls on 10,000 shares in the company as and when the same should become payable, and whether such calls had already been made or not, with full power and authority to and for the respondents, or the survivor of them, or the executors or administrators of such survivor, their or his assigns, to ask, demand, sue for, recover and receive, and to give effectual receipts and discharges for the same either in their or his own names or name, or in the name of the company, their successors or assigns, to hold the same unto the said respondents, and the survivor of them, their or his assigns, by way of mortgage to secure the due payment of the principal money and interest secured by the said debentures. 268] And in the said indenture was *contained a covenant by the company with the respondents, and the survivor of them, and the executors or administrators of such survivor, their or his assigns, that the company would make such calls as they should be required to do by the respondents, or either of them, their or either of their executors, administrators, or assigns, provided such calls were authorized by the deed of settlement of the company, or any supplemental deed thereof, to be made at the option of the company. The said indenture also contained a power of sale and other usual mortgage provisions.

By indenture of even date with the said mortgage of the 29th of August, 1871, the loan trustees, under the be-

fore-mentioned deeds of the 1st of August, 1867, and of the 1st of August, 1865, reassigned to the company the unpaid calls assigned to them under the said deeds.

On the 4th of June, 1872, the whole of the then unpaid capital of the company had been called up, except the sum of 5s. per share; this call amounted in all to £2,183 10s. There was also due at the time to the company, for arrears of previous calls, the sum of £1,240 5s.

On the said 4th of June, 1872, the respondents demanded payment of the moneys due on the said 136 debentures, and the company, on the 5th of June, 1872, replied to this demand, that they were unable to comply with it. Thereupon the respondents served a notice on the company, demanding of the company and the directors thereof that they should make a call of 5s. per share on the shareholders of the company.

On the 8th of July, 1872, it was resolved that the company should be wound up voluntarily, and the respondent Abraham Abrahams was duly appointed liquidator, who thereupon, as such liquidator, on the same day made a call of 5s. per share on the shareholders of the company.

The Supreme Court, on the 5th of August, 1872, ordered that the voluntary winding-up of the company should be continued subject to its supervision, and on the 22d of August, 1873, dismissed the application of the respondents, Breakell and Gordon (opposed by the appellants as the unsecured creditors of the company), that the liquidator should pay the principal and interest due on the said 136 debentures out of the money realized by him *in respect of [269 the call of 5s. per share made by him as aforesaid, and in respect of the arrears of previous calls due by the shareholders. On the 17th of September, 1873, a majority of the Appeal Court reversed this dismissal and ordered as prayed.

Mr. A. G. Marten, Q.C., and Mr. Robinson, for the appellants, the unsecured creditors of the company, contended that it was *ultra vires* the company and its directors to give any security upon the capital of the company which had not been called up at the date when such security was given. It was inconsistent with the lawful exercise of the powers of the directors, and with the continuance of the company, so to do. They referred to *Lishman's Case* (1); *In re Sankey Brook Coal Company* (2); *British Provident Life and Fire*

(1) 23 L. T., (N. S.), 759; S. C., 19 W. R., 344.

(2) Law Rep., 9 Eq., 721; see also Law Rep., 10 Eq., 381.

1875

Bank of South Australia v. Abrahams.

J.C.

Assurance Society, Stanley's Case(¹); *King v. Marshall*(²); *In re Marine Mansions Company*(³).

Mr. H. M. Jackson, Q.C., and Mr. Romer, for the respondents, Breakell and Gordon, contended that the charge upon the unpaid calls (already and subsequently to be made) was effectual. Until the calls are paid the shareholder is bound by his covenant under seal to abide by all the terms of the articles of association. They cited *In re Panama, New Zealand and Australian Royal Mail Company*(⁴); *Re The Humber Ironworks Company*(⁵); *Bloomer v. Union Coal and Iron Company*(⁶); *Holroyd v. Marshall*(⁷); *Webb v. Whiffin*(⁸); *Ex parte Briton and General Medical Life Association*(⁹).

Mr. Everitt, for the liquidator.

March 16, 1875. The judgment of their Lordships was delivered by

The LORD JUSTICE JAMES: The question in this appeal is, whether a power in a deed of settlement of a joint stock 270] company authorizing the directors to *mortgage or change the property of the company, gives them authority to include in such mortgage or charge future calls, or, in other words, the unpaid capital of the company.

There was a difference of opinion amongst the judges of the Supreme Court, before which the question was brought on appeal from the order of the primary judge. The majority were of opinion that the word "property" included future calls, and that the law had been so settled in this country by *Lishman's Case*, a Vice-Chancellor's decision, cited from the "Law Times."

The dissentient judge who had made the order then under appeal admitted that this was so, but thought that the context of the deed excluded that construction in this particular case.

It is much to be regretted that the attention of the judges was not called to *Stanley's Case*(¹⁰), a decision of the Court of Appeal which has been followed in other cases, and has been cited and referred to in every text-book as the leading case authoritatively settling the rule of law.

In that case the words of the power were "property and funds," and it was held that a charge on future calls was *ultra vires* and void. It is impossible to distinguish that case from the one under appeal, and the contention on the

(¹) 4 De G., J. & S., 407; S. C., 33 L. T., 536.

(²) 33 Beav., 565.

(³) Law Rep., 4 Eq., 601.

(⁴) Law Rep., 5 Ch. App., 318.

(⁵) 16 W. R., 667.

(⁶) 29 L. T. (N.S.), 130.

(⁷) 10 H. L. C., 191.

(⁸) Law Rep., 5 H. L., 711.

(⁹) Law Rep., 5 Ch. App., 428.

(¹⁰) 4 De G., J. & S., 407; S. C., 33 L. T., 536.

part of the respondents was, that their Lordships, or the ultimate tribunal of appeal, should review that decision, and overrule it, as not being a correct exposition of the law.

Even if their Lordships had any doubt as to that decision, they would not have felt themselves warranted in disturbing a rule which has been uniformly (with the exception of *Lishman's Case* (1)) assented to and acted upon in this country. And it is to be noted with respect to *Lishman's Case* (1) that, although it was after *Stanley's Case* (2) had been decided by the Court of Appeal, the Vice-Chancellor does not appear to have referred to that case, and *Lishman's Case* (1) has not found its way into the authorized reports or text-books.

The decision in *Stanley's Case* (2) appears to be based on very intelligible and reasonable grounds. The capital not paid up is, according to the usual form of deeds of settlement (the form in *this case), only *sub modo* the prop- [271] erty of the company. The company has no absolute right, and the shareholder is under no absolute liability to pay. The right only arises if and when calls are made by the directors in the exercise of a discretion within limits both of time and amount prescribed by the deed.

The due making of the call by the resolution of a board of directors is an essential condition precedent.

It was held, therefore, in *Stanley's Case* (2), that the general words "power to charge property and funds," could not be intended to create a charge. It would either leave it optional with the directors to give it effect by making calls which would be nugatory, or it would entirely alter the provisions of the deed as to calls, which is not to be implied.

Their Lordships see no ground for dissenting from that view. They may add that the right of the company is, strictly speaking, more in the nature of power than of property; and, although that which a man has power to make his own may be charged, as well as that which is actually his, it requires apt and proper words, or a sufficient context, to have this effect.

In the particular case before them, the power was contained in a deed of settlement of a company which, at the time, was a partnership with unlimited liability; and, although they afterwards availed themselves of the power to register as a company with limited liability, the construction of the deed must, of course, be the same as it originally was.

In such a partnership the provisions as to calls and capital

(1) 23 L. T. (N.S.), 759; S. C., 19 W. (2) 4 De G., J. & S., 407; S. C., 33 L. R., 344. T., 536.

1875

Bank of South Australia v. Abrahams.

J.O.

are merely the internal arrangements and bargains of the partners as to raising money for the concern, and it would be a strange thing to pledge these as an additional security to creditors, who had the whole fortune of every shareholder by law pledged to them.

Their Lordships will humbly recommend to Her Majesty that the appeal be allowed, and that the order of the Supreme Court complained of be discharged, and that in lieu thereof there be an order dismissing the appeal to that court, and affirming the order of the primary judge with costs.

The appellants are to have their costs of the appeal, to be 272] paid *by the respondents, Breakell and Gordon. The official liquidator will take his costs of the appeal out of the estate.

Solicitors for the appellants: Messrs. *Hollams, Son & Coward*.

Solicitor for the respondents, Breakell and Gordon: Mr. *H. W. Trinder*.

Solicitors for the liquidator: Messrs. *Torr & Co*.

A contract made by individuals in view of the organization of an incorporated company may be adopted by such corporation when formed, so as to render the corporation liable thereon: *Hoag v. Lamont*, 60 N.Y., 96; 16 Abb. Prac., N. S., 372-6, Ct. of App.; *Fredendall v. Taylor*, 26 Wisconsin, 286; *Paxton v. Bacon, etc.*, 2 Nevada, 257; 1 Weekly Notes of Cases, 618; *R. R. v. Sage*, 65 Illinois, 328.

But where the plaintiff was employed by one of the corporators named in the charter of a corporation, to act as a bookkeeper, and in that capacity rendered services before the organization of the company and when the organization was formed, neither the plaintiff nor anyone else informed the stockholders of the services he had performed, or that he expected to claim payment therefor, and the evidence failed to show that the company appropriated his labor or its avails to their use, audited his account or ever agreed to pay him; Held that the facts showed no ground of recovery: *Safety Deposit v. Smith*, 65 Illinois, 309.

No resolution to adopt such a contract of corporators by the directors of the corporation when formed is necessary, but a practical acceptance of it by the managing officers, or persons who had the control of the company, so

as to become the act of the company, is sufficient: *Hoag v. Lamont*, 60 N.Y., 96, 16 Abb. Prac. Rep., N. S., 372-6; *Hooker v. Eagle Bank*, 30 N.Y. Rep., 83; *Phillips v. Campbell*, 43 N. Y., 271; *Peterson v. Mayor of N. Y.*, 17 N. Y. Rep., 453; *Bradstreet v. Bank of Roylton*, 42 Vermont, 128.

Where several parties become stockholders by subscribing stock for the purpose of establishing an incorporated seminary, and each subscribes the amount which he proposes to pay for such purpose, no implied authority can be inferred from such promise, warranting any of the parties in contracting debts or advancing money on the credit of the other parties.

Such subscription agreement is simply one to pay for the stock subscribed in the association to be incorporated, and did not contemplate the conduct of any enterprise as copartners, nor as members of an unincorporated joint stock association.

Where the plaintiffs, as trustees of such contemplated incorporated seminary, proceeded to contract debts, expend money, and incur personal liability in the erection and furnishing of such seminary, both before and after the incorporation of the same, they cannot maintain an action against the individual stockholders thereof to compel a

contribution for discharging such debts and obligations.

The articles of association for the purpose of completing an incorporation and establishing such seminary, do not establish such relations between the stockholders as would authorize the trustees to contract debts or make advances on the credit of their associates: *Shibley v. Angle*, 37 N. Y. Rep., 626.

To same effect, *Kent Benefit Building Society*, 1 Drury & Smale, 417; *Bank v. Almy*, 117 Mass., 478.

But see *Alexander v. McAlister*, MacLean & Robinson, 353, where no incorporation was intended.

A benefit building society has no power to borrow money unless its rules specially authorize it to do so. The directors of a benefit building society, the rules of which gave no power to borrow money, borrowed a sum of money for the purpose of advancing it to their members on the security of their shares. The lender of the money afterwards presented a petition to wind up the company: Held (distinguishing *Matter of German Mining Co.*, 4 De Gex, MacNaghten & Gordon, 19) that the transaction was *ultra vires*, and that the petitioner had no legal or equitable debt against the company, and the petition was accordingly dismissed: *Matter of National, etc.*, L. R., 5 Chancery App., 309.

Where certain persons associated for the purpose of instituting a bank, and at a meeting of the associates, at which all were not present, an agent was appointed for the purpose of procuring a charter, who attended accordingly, but did not obtain the charter, it was held that the associates were jointly liable to the agent for his services: *Sproat v. Porter*, 9 Mass., 300.

When A., acting for an unincorporated association, contracts with one who enters into the contract on the credit of A., the latter is bound. If A. contracted on the credit of himself and others constituting with him the officers of such association, and they had authorized or subsequently ratified his acts, they are all liable *although they contracted as such officers*, and although they were ignorant at the time, that they were incurring any personal liability. The questions whether the credit was given to defendants, and whether they had authorized or ratified the con-

tract, were for the jury: *Fredenthal v. Taylor*, 26 Wisconsin, 286, see note 9 English Rep., 14.

Where by the rules of a club, it appeared to be the intention of the parties that all dealings should be for ready money, and a fund was provided for the committee, whose duty it was "to manage the affairs of the club," held that the members were not personally liable for any contracts on credit entered into by the committee: *Fleming v. Hector*, 2 Gale, 180.

If agents of an unincorporated joint stock company, acting within the scope of their employment hire a mechanic to do work for the company, its members as partners, are liable to him for his work, although they did not know by whom the work was done, nor exactly what was to be done, and as between themselves their articles of association had not been complied with, and those articles gave no authority, in terms, to anybody to incur a debt for the company: *Bodwell v. Eastman*, 106 Mass., 525.

Parties assuming to act in a corporate capacity, without a legal organization as a corporate body, are liable as partners to those with whom they contract, but it must be shown they were so acting at the time the contract sued upon was made or that for some other consideration he agreed to become liable: *Fuller v. Rowe*, 57 N. Y., 23.

It has been held that the trustees of a corporation who carry on business after the charter expires, are not personally liable for debts they so contract: *Fuller v. Rowe*, 5 Hun, 23.

Where the defendant was sought to be made liable as a stockholder in a corporation, or subscriber to its stock, although it was not pretended that he was one of the original corporators, or that after the incorporation of the company, he ever subscribed for any number of shares of its capital stock; but he was sought to be held solely upon a preliminary agreement signed by him, before such corporation was organized, in and by which he agreed to unite with others in the formation of a joint stock or incorporate company, for certain specified purposes; it was held, that the signature of the defendant to this preliminary agreement did not make him a stockholder in said corporation, or bind him to take and pay for stock therein.

1875

Dow v. Black.

J.C.

Nothing in the act of 1848 authorizing the formation of such corporations gives effect to a preliminary agreement to become a stockholder in a proposed corporation; and the agreement itself cannot have such legal effect: *Dorris v. Sweeney*, 64 Barb., 686.

But where the defendant, with others, signed an agreement to unite in the formation of a company and take a number of shares of stock therein specified; and subsequently he, with others, signed a certificate of incorporation, as

required by the act of 1848, in an action brought by the receiver of the company to recover the amount due upon the shares subscribed for by the defendant held, 1. That the defendant was estopped from denying that the company was legally incorporated; 2. That he was bound to pay for the number of shares subscribed by him, by the articles of association before the corporate body had a legal existence: *Dorris v. French*, 4 Hun, 292, 6 N. Y. Supreme Court Rep., 581.

[Law Reports, 6 Privy Council Cases, 272.]

J.C. (1), March 5, 1875.

JAMES DOW and Others, Appellants; and WILLIAM T. BLACK, and Others, Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Distribution of Legislative Power—Legislature of New Brunswick.

Held, that the act of the provincial legislature of New Brunswick (33 Vict. c. 47), intituled "an Act to authorize the issuing of debentures on the credit of the lower district of the parish of St. Stephen, in the county of Charlotte," which empowered the majority of the inhabitants of that parish to raise by local taxation a subsidy, designed to promote the construction of a railway extending beyond the limits of the province, but already authorized by statute, is within the legislative capacity of that legislature.

Under art. 2 of sect. 92 of the British North America Act, 1867, passed by the Imperial Parliament, the provincial legislature is enabled to impose direct taxation for a local purpose upon a particular locality within the province.

The act in question relates to "a matter of a merely local or private nature in the province," which by the 92d section of the Imperial Act is assigned to the exclusive competency of the provincial legislature, and does not relate to the railway, or any local work or undertaking within the excepted subjects mentioned in art. 10, sub-sect. (a) of the said section.

L'Union St. Jacques de Montreal Dame Julies Bélisle (2) approved.

THE question decided in this appeal was whether the act of the provincial legislature of New Brunswick (33 Vict. c. 273] 47) is within "the powers of that legislature according to the true construction of the Imperial Statute, the "British North America Act, 1867."

The act in question, intituled "An Act to authorize the issuing of debentures on the credit of the lower district of the parish of St. Stephen," is, so far as is material for the present question, in the following terms:

"Whereas the inhabitants of the town of St. Stephen, in

(1) *Present*: SIR JAMES W. COLVILLE, THE LORD JUSTICE JAMES, THE LORD JUSTICE MELLISH, and SIR MONTAGUE E. SMITH.

(2) *Ante*, p. 31.

the county of Charlotte, are desirous of having direct railway connection between Houlton, in the state of Maine, and the St. Croix Valley, in the county aforesaid; and whereas the town of Houlton has offered the Houlton Branch Railway Company a bonus of \$30,000, upon condition that the said Houlton Branch Railway Company shall and do construct and suitably equip with necessary rolling stock a railway from the town of Houlton aforesaid to the line of the New Brunswick and Canada Railway and Land Company, at or near the Debec Station so called, and so that the said railway shall be completed and ready for the conveyance of passengers and freight on or before the 1st day of January in the year of our Lord 1872; and whereas the said Houlton Branch Railway Company are willing to undertake the building and construction of such connecting line of railway, and have the same completed and properly equipped for the conveyance of freight and passengers as aforesaid, within the time aforesaid, upon the conditions that the town of St. Stephen do and shall give to the said Houlton Branch Railway Company a bonus of \$15,000: and whereas the inhabitants of that portion of the said town of St. Stephen called the lower district, and hereinafter particularly described, are willing and desirous to give the said sum for the said purpose, and that the said sum should be raised upon the credit of the real and personal property of the inhabitants of the said lower district in such mode and manner as may be thought most advisable.

“Be it therefore enacted by the Lieutenant-Governor, Legislative Council, and Assembly, as follows:

“1. That upon the said Houlton Branch Railway Company giving reasonable and proper security to the justices of the peace in general sessions or special sessions called for that purpose, that the said line of railway from Houlton to the line of the said New Brunswick and Canada Railway and Land Company shall be built *and efficiently fur- [274
nished and completed, and substantially ready and fit for the conveyance of freight and passengers, and properly provided with all necessary locomotive engines, cars, and carriages, within the time aforesaid limited for so doing; such reasonable and proper security to be by bond under the hand and seal of not less than three responsible persons, resident and having property in this province, under the penalty of \$40,000 conditioned as herein above stated, which said bond the said justices are hereby authorized to take and enforce by suit at law for breach thereof, if such shall occur; no person shall be accepted as such security until he shall have

first made affidavit before some justice of the peace in the county of Charlotte who is hereby authorized to administer such oath, to be filed in the office of the clerk of the peace for said county, that the value of his property in this province, over and above all his just debts and liabilities, is not less than \$20,000; the said justices in general or special sessions shall forthwith issue and deliver, or cause to be issued and delivered, as a bonus to the said Houlton Branch Railway Company, certificates of debt to be called debentures to the amount of \$15,000 in current money of the province of New Brunswick, of such denomination or denominations as they may see fit, to be numbered consecutively according to the denomination thereof, from number one upwards, of each denomination, with coupons annexed, bearing interest at 6 per centum per annum, payable semi-annually, at such place as shall be therein specified, and on such conditions and terms as shall be prescribed by the said justices in general or special sessions; the principal money of such debentures to be paid in full at the expiration of twenty years from the date thereof to the holders of the same, at such place and in such manner as shall be prescribed in the same.

"2. The real and personal property of all persons, resident or non-resident, situate in the lower district of St. Stephen's, so called, described as follows (then follow the boundaries): 'Shall each and every year, during the continuance of the term of the said debentures, be assessed for the payment of the interest on such debentures, issued under the authority of this act, an order for which assessment shall be made by the said justices in general or special sessions each and every year as aforesaid, and levied and collected *in the same manner in all respects as parish and county rates are now or may be hereafter assessed, levied and collected, and when collected shall be paid into the St. Stephen's Bank, in the county of Charlotte, or such other place as may at first or at any subsequent period be selected by the said justices by order of the justices in general or special sessions to the collector of same for the purpose of paying the coupons on said debentures, which coupons shall be paid by the cashier of the said bank or other person selected as aforesaid, to the holders of such coupons, upon presentation thereof out of the funds so deposited.'"

Section 3 of the act provides for a similar assessment by order of the justices in general sessions, for the repayment of the principal sums due on the debentures within twenty years, but at such times and in such mode as the justices shall determine.

Sect. 4 provides for the form of debentures.

Sect. 5 provides for the summoning by two justices of a meeting of the ratepayers of the said lower district of the parish of St. Stephen, and enacts that the act shall not come into force unless it is approved at such meeting by two-thirds of the ratepayers, but that if it is so approved the justices shall certify the same to the governor in council, and the governor shall thereupon announce the same by proclamation in the Royal Gazette of the province, and that thereupon the act shall be *ipso facto* in full operation, force, and effect.

A meeting of the ratepayers of the said lower district of St. Stephen was held on the 11th of August, 1870, and the requisite majority of votes in favor of the act was obtained and the debentures issued.

On the 14th of April, 1871, the justices of the peace at the general sessions for the county of Charlotte issued a warrant to the appellants, the assessors of the parish of St. Stephen, commanding them to levy and assess \$958 50c. on the lower district of St. Stephen, to pay the interest on the said debentures.

The appellants accordingly assessed the ratepayers of the district, and amongst others the respondents, and the collector of rates applied to the respondents for payment, which they refused.

The respondents thereupon applied for and obtained a writ of **certiorari* to remove into the Supreme Court [276 the said warrant of assessment, and the assessment and all notices and documents upon which they were founded.

A return, and subsequently an amended return, having been made, the respondents applied for and obtained a rule *nisi* to quash the said warrant and assessment on the ground that the act 33 Vict. c. 47, related to a railway extending beyond the limits of the province, and was therefore not within the competence of the provincial legislature of New Brunswick.

On the 22d of February, 1873, the Supreme Court (Ritchie, C.J., Allen and Weldon, J.J.) gave judgment, making the rule absolute to quash the said warrant and assessment on the ground stated in the rule. Fisher, J., dissented on the grounds, first, that the Imperial Act, sect. 92, sub-sect. 10, paragraph (a), related only to railways between two provinces, and not to railways from a province into a foreign country; secondly, that the court might presume that the money raised by debentures would be applied to the making of the part of the railway within the province, and that an act to raise money for that purpose was within the competency of the provincial legislature.

Mr. *Benjamin*, Q.C., and Mr. *W. Grantham*, for the appellants.

Mr. *Fry*, Q.C., and Mr. *Bompas*, for the respondents.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILLE: This is an appeal against an order of the Supreme Court of the province of New Brunswick, making absolute a rule *nisi* that had been granted, and ordering that "the assessment made upon the lower district of the parish of St. Stephen, in the county of Charlotte, under and by virtue of a warrant of assessment issued to the assessors of the parish of St. Stephen by the general sessions of the peace in and for the county of Charlotte on the 14th of April, 1871, directing the said assessors to assess upon the lower district of St. Stephen the sum of \$958 50c. for payment of interest upon debentures issued under the 277] act of Assembly, 33 *Vict. c. 47, intituled 'An act to authorize the issuing of debentures on the credit of the lower district of the parish of St. Stephen, in the county of Charlotte,' and the said warrant and all proceedings upon which the said assessment is based be absolutely quashed."

The ground upon which the majority of the judges constituting the court proceeded, was that the act of Assembly mentioned in the order was itself null and void, inasmuch as it had been passed by the provincial legislature of New Brunswick, which, on the true construction of the Imperial Statute, "The British North America Act, 1867," had no power to make such a law.

It is necessary, in order to deal with the arguments which have been addressed to their Lordships upon this appeal, to consider shortly under what circumstances this question arose. On the 10th of June, 1867, and before the Imperial Statute just mentioned came into operation, the then legislature of New Brunswick passed an act, by the 6th section of which it was provided,—“That the sum of \$5,000 per mile, and not exceeding in the whole \$17,500, should be granted for the construction of a branch line of railway to the boundary line of the state of Maine, from the railway leading from St. Andrews to Woodstock, to such person or persons or body corporate as shall construct the said road, upon its being proved to the satisfaction of the Governor in Council that a good and sufficient railway is constructed therein within four years from the passing of this act, and in good working order for travel and traffic.” That act was followed by another passed a few days afterwards, viz., on the 17th of June, by which certain persons were made and constituted a body corporate under the name of the Houlton

Branch Railway Company, and were authorized to make and construct a railway running from the intersection of the Woodstock line of railway with the New Brunswick and Canada Railway, being a place known as Debec, to the boundary line of the state of Maine and the province of New Brunswick. The 5th section of that act contains the following provisions—

“The president, directors, and company for the time being are hereby authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation for the purpose of locating and completing said railroads *and branches, and for the transportation of [278 persons, goods, and property of all descriptions; and all such power and authority for the management of the said corporation as may be necessary and proper to carry into effect the objects of this act, to purchase or hold within or without the province lands, materials, engines, cars, and other necessary things, in the name of the corporation, for the use of the said road, and for the transportation of persons, goods, and property of all descriptions, and to make such connection with other railway companies within or without the province, either by leasing their road to other corporation or corporations, on such terms and for such length of time as may be agreed upon, or by consolidating the stock of their road with that of other railway company or companies, upon such terms as may be agreed upon;” and gives other powers to the new company.

Hence, on the 7th July, 1867, when “the British North America Act, 1867,” came into operation, the Houlton Branch Railway Company had been duly incorporated, and by the act of a competent legislature had been duly authorized to construct a railway from Debec to the frontier that divides the province from the state of Maine. Some years afterwards the act, the validity of which is now called in question, being the 33 Vict. c. 47, was passed.

Its preamble recites that the town of Houlton, which is in the state of Maine, had offered the Houlton Branch Railway Company a bonus of \$30,000, upon condition that the said Houlton Branch Railway Company should construct and suitably equip with necessary rolling stock a railway from the town of Houlton aforesaid to the line of the New Brunswick and Canada Railway and Land Company, at or near the Debec station, before the 1st of January, 1872; that the Houlton Branch Railway Company were willing to undertake the building and construction of such connecting line of railway, &c., and to have the same completed and properly equipped for the conveyance of freight and passengers

as aforesaid within the time aforesaid, upon condition that the town of St. Stephen,—that being a town in the province of New Brunswick,—should give to the said Houlton Branch Railway Company a bonus of \$15,000; and that the inhabitants of that portion of the said town of St. Stephen called the lower district, which was afterwards described, were 279] willing and desirous to give the said sum for the *said purpose, and that such sum should be raised upon the credit of the real and personal property of the inhabitants of the said district in such manner as might be thought most advisable. It clearly appears from these recitals that there was a desire, both on the part of the inhabitants of Houlton, in the state of Maine, and the inhabitants of that portion of St. Stephen in the province of New Brunswick, or some of them, that this line of communication between the two places should be completed; that its completion was considered to be for the benefit of both communities; and that a portion, at all events, of the inhabitants of that district of St. Stephen, in order to effect the arrangement, were willing to be taxed for the purpose of raising the bonus of \$15,000 required by the Houlton Branch Railway Company. Accordingly the act of Assembly provided for the carrying out of the arrangement in this way: It required the Houlton Branch Railway Company to give reasonable and proper security to the justices of the peace at general or special sessions for the completion of the work; and provided that thereupon the \$15,000 should be raised by the issue of debentures to that amount payable twenty years after date, and carrying interest in the meantime. It further provided that the real and personal property of all persons resident in the lower district of St. Stephen, as defined by the act, should be assessed in order to raise the interest on such debentures, and the principal when the latter should become due. But it also provided that the act should not be in force until it had been accepted and approved by two-thirds at least of the ratepayers liable to be assessed thereunder, whose assent was to be obtained by the machinery thereby provided, and, when ascertained, was to be certified to the Governor in Council,—that is, the Governor-General in Council of Canada,—who was to announce the same by proclamation in the Royal Gazette. The act in question was never disallowed by the Governor-General of Canada; all the formalities prescribed by it appear to have been complied with, and the assent of the requisite proportion of ratepayers to have been duly notified in the Gazette.

In this state of things it is to be presumed that the minor-

ity of the ratepayers which dissented from the arrangement was unwilling to pay the rate assessed upon them in order to meet the *interest on the debentures, and raised this [280 question before the Supreme Court. That court issued a *certiorari* to remove the proceedings, and, upon the return of the *certiorari*, made the order *nisi*, which the order under appeal has made absolute.

The grounds upon which the Supreme Court has pronounced this act to be *ultra vires* of the local legislature are entirely derived from sub-sect. (a) of the 10th article of sect. 92 of the Imperial Statute. Sects. 91 and 92 purport to make a distribution of legislative powers between the Parliament of Canada and the provincial legislatures, sect. 91 giving a general power of legislation to the Parliament of Canada, subject only to the exception of such matters as by sect. 92 were made the subjects upon which the provincial legislatures were exclusively to legislate. The 10th article of sect. 92 among those subjects enumerates local works and undertakings other than such as are of the following classes. Then follow the exceptions, and the first of these is, lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province. A question touching the construction of this sub-section has been raised both here and in the court below. The respondents insist that the lines of railways which are thereby put within the exclusive jurisdiction of the Parliament of Canada are all railways which extend either beyond the limits of the province into other provinces within the dominion or into foreign countries. On the other hand, the appellants contend that a more limited construction is to prevail, and that if the sub-section be taken in connection with the following sub-sect. (b), it will be found to apply only to railways extending beyond the limits of one province into another province of the dominion.

Their Lordships do not think it necessary to determine upon the present appeal this question of construction, or to affirm that if all the legislation that has taken place, including that for the incorporation of the Houlton Railway Company, and empowering it to make a railway to the frontier or beyond it, had taken place after the Imperial Statute of 1867 had come into operation, such legislation would have been within the powers of the provincial legislature. They do not think it necessary to determine that question, because they are of opinion that the validity of the act *of As- [281 ssembly, the 33 Vict. c. 47, does not depend upon the sub-

section in question. They are of opinion that the act cannot be said to be a law in relation to a local work or undertaking within the fair and reasonable meaning of these words. The incorporation of the company, with its powers, and the construction of the railway up to the frontier, and therefore so far as any legislative power within the British dominions could determine that construction, had been already authorized by the acts passed before the Imperial Statute came into operation. The act now in question did not purport to enlarge the powers of the railway company, nor could it give them powers to be exercised on the foreign soil of Maine. Their Lordships consider that if the railway company had chosen to make an arrangement with the inhabitants of Houlton, in the state of Maine, for the construction of the railway on the terms of the bonus of \$30,000 which had been offered to them from Houlton, there would have been no legal objection to their carrying out that arrangement. The act was merely one which enabled the majority of the inhabitants of the parish of St. Stephen to raise by local taxation a subsidy designed to promote a work which they considered to be for the benefit of their town, and to place the inhabitants in a position to bargain and to act for their common benefit in the same manner as a private person might have thought it for his benefit to do. In substance and principle it does not differ from a private act authorizing the trustees or guardians of a minor to let a warehouse to such a company. Supposing the work, instead of being a railway, had been a canal, and the inhabitants had been authorized to make a bargain for the supply of water to the district, could any doubt have been entertained on the subject? Their Lordships are therefore of opinion that no objection to the validity of the act is to be found in the subsection in question.

Another question has been raised for the first time at this bar (for the objection does not appear to have been taken in the colonial court), whether there was power in the provincial legislature to pass an act by which such an assessment as this could be imposed on the town of St. Stephen.

It has been argued that whereas the 91st section reserves to the Parliament of Canada exclusive power of legislation in respect of, amongst other subjects, "The raising of money 282] by any mode or *system of taxation," the only qualifications imposed on that general reservation are to be found in the 2d and 9th articles of the 92d section. The latter has obviously no bearing on the present question. As to the former, it was contended that it authorizes direct taxation

only for the purpose of raising a revenue for general provincial purposes, that is, taxation on the whole province for the general purposes of the whole province.

Their Lordships see no ground for giving so limited a construction to this clause of the statute. They think it must be taken to enable the provincial legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province. They conceive that the 3d article of sect. 91 is to be reconciled with the 2d article of sect. 92, by treating the former as empowering the supreme legislature to raise revenue by any mode of taxation, whether direct or indirect; and the latter as confining the provincial legislature to direct taxation within the province for provincial purposes. Their Lordships are further of opinion, with Mr. Justice Fisher, the dissentient judge in the Supreme Court, that the act in question, even if it did not fall within the 2d article, would clearly be a law relating to a matter of a merely local or private nature within the meaning of the 9th article of sect. 92 of the Imperial Statute; and therefore one which the provincial legislature was competent to pass, unless its subject-matter could be distinctly shown to fall within one or other of the classes of subjects specially enumerated in the 91st section. This view is in accordance with the ruling of this tribunal in the recent case of the *L' Union St. Jacques de Montreal v. Dame Julie Bélisle* (¹), decided on the 8th of July, 1874.

On these grounds their Lordships will humbly advise Her Majesty that the order under appeal be reversed, and that in lieu thereof an order be made discharging the rule *nisi*, which had been granted in Trinity Term, with costs. The appellants will also have their costs of this appeal.

Solicitors for the appellants: Messrs. *Upton, Johnson, Upton & Budd*.

Solicitors for the respondents: Messrs. *Bischoff, Bompas & Bischoff*.

(¹) *Ante*, p. 31.

Bonds issued by a corporation, under its seal, negotiable in form, are negotiable securities, and pass by delivery in the same manner and with the same effect as promissory notes: *Hotchkiss v. National Bank*, 21 Wallace, 354; *Vermilyea v. Adams Express Co.*, 21 Wallace, 38; *Brainard v. New York, etc.*, 25 N.Y., 496; *Bank of Rome v. Village of Rome*, 19 N.Y., 20; *Lindsley v. Diefendorf*, 43 How. Prac., 357; *Blake v. Board of Supervisors*, 61 Barb., 149; *Finnegan v. Lee*, 18 How. Prac., 186; *Conn., etc., v. Cleveland, etc.*, 41 Barb., 9; 26 How. Prac., 225, affirming 23 How., 180; *Moran v. Comrs.* 2 Black, 722; *Mercer County v. Hackett*, 1 Wallace, 83; *Gilpecke v. Dubuque*, 1 Wallace, 176; *Clapp v. Cedar County*, 5 Iowa, 15; *Ring v. Johnson Co.*, 6 Iowa,

1875

Dow v. Black.

J.C.

265; see also, *Matter of Imperial, etc.*, L. R., 11 Eq., 478, 486, 495; 7 Am. Law Rev., 71; *Huidekoper v. Buchanan Co.*, 1 Central Law Jour., 177; *Murray v. Lardner*, 2 Wallace, 110; *Thompson v. Lee Co.*, 3 Wallace, 327; *The City v. Lamson*, 9 Wallace, 478.

As to what makes one a *bona fide* holder of such bonds or coupons attached, see notes 6 Eng. Rep., 120, 9 Eng. Rep., 115.

The supreme court of the United States has repeatedly held that a *bona fide* holder of such bonds could recover against the municipality issuing them, although the statutory requirements to their issue had not been complied with: *Thompson v. Lee County*, 3 Wallace, 327; *Mercer County v. Hackett*, 1 Wallace, 83; *Lee County v. Rogers*, 7 Wallace, 181; *Supervisors v. Schenck*, 5 Wallace, 772; *Township of Pine Grove v. Talcott*, 19 Wallace, 686; *Rice v. Railroad Co.*, 1 Black, 386; *Milner's Admr. v. City of Pensacola*, 2 Am. Law Times Rep., 186; *Ritchie v. Franklin Co.*, 7 Chicago Leg. News, 297; *Woodward v. Supervisors*, 2 Central Law Jour., 396; *Munson v. Lyons*, 12 Blatchford, 539.

Where the statute provides that upon certain assents of tax payers of the town being obtained, the bonds thereof may be issued, the commissioner, being an officer and agent of the town, is charged by the legislature with and supposed to protect its interests. Like all other agents he may err, but the legislature say to purchasers of bonds that they may rely upon this agent of the town discharging his duty to his principal and not issuing the bonds until he has a right to do so; but that inasmuch as he had the consents and canvassed them, had access to the assessment rolls charged with the duty of ascertaining when he had a right to issue the bonds if he erred his principal, the town, should suffer the injury, if any, which resulted from his mistake, rather than innocent third persons who part with their money upon the strength of his official action. In other words, the legislature say to purchasers of such bonds, the law presumes that every officer discharges his duty; and we say to you in order to enhance the value of these bonds, and to facilitate their sale, that if you purchase them *you* shall be protected, and the principal bound by the acts and the good faith of

its agent. If the commissioner acts in good faith, he, like every other agent, is protected; if not, the innocent purchaser is protected, and the town turned over, as in justice it ought to be, to the faithless agent and his official bond: *Bank of Rome v. Village of Rome*, 19 N. Y., 25.

In *Town of Queensbury v. Culver* (19 Wallace, 92), the court said: "It is vain to say that the statute imposed no duty upon the town or its officers. No one can doubt that it is competent for the legislature to determine by what agent a municipal corporation shall exert its powers. The statute in question did designate the agents and their acts, within the authority conferred, are binding upon their principal, upon the town of which they had been constituted the agents."

In *Bank of Rome v. Village of Rome* (19 N. Y., 22), the court said: "It was contemplated by the act that the bonds should be sold in the market. This would be impracticable if every purchaser must, at his peril, investigate the amount of the subscriptions and ascertain whether each was valid."

Again (pp. 24-25): "But the question is very different where the rights of a *bona fide* holder are concerned. The bonds, as we have seen, were executed by due authority, the only defensive allegation being that they were improperly issued and thrown upon the market by the commissioners. Admitting this allegation to be true, I think it is no defense. It is true that every person purchasing one of these bonds in market knew, or was bound to know, what were the conditions under which they could be lawfully issued. These were prescribed in the statute; but the same statute required a certificate to be made, which was to become a public record, declaratory of the fact that all the conditions had been performed. In the case of *The State of Illinois v. Delafield* (*supra*), state bonds or stocks had been prepared and executed by the officers having due authority of law, the purpose being to sell them in order to raise funds for the construction of a canal. They were put into the hands of agents for sale, who sold and delivered them in violation of an express provision of the law which authorized their creation. It was held by the chancellor—and, on appeal, by the court of errors—that the bonds

would be obligatory upon the state of Illinois, in the hands of *bona fide* holders; and on that ground, the defendant, Delafield, was restrained from selling or disposing of them. That decision rested on a principle entirely familiar in the law of negotiable paper, and of no doubtful application to the present case. *If the commissioners abused or transcended their powers in the sale of the bonds in question, the statute under which they acted made them personally liable to the village of Rome* (section 4). But such abuse or excess of power would not affect parties purchasing the bonds in good faith, beyond the means which the statute itself provided for ascertaining the facts on which the exercise of the power depended. Those facts were to be declared in the certificate before mentioned. That being made and filed, as the law required, and the bonds being actually issued by the commissioners, they could be safely bought in the market like other negotiable instruments. It is, indeed, scarcely possible that the legislature could have any other design in requiring such a certificate to be made."

In *Commissioners of Knox Co. v. Aspinwall* (21 How. U. S., 544, 545), the court said: "The case assumes that the requisite notices were not given of the election, and hence that the vote has not been in conformity with the law.

"This view would seem to be decisive against the authority on the part of the board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond, or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription?

"The court is of opinion that the question belonged to this board. The act makes it the duty of the sheriff to give the notices of the election for the day mentioned, and then declares, if a majority of the votes given shall be in favor of the subscription, the county board shall subscribe for the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes

had been cast in favor of the subscription; and to have acted without first ascertaining it, would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. This board was one from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests.

"We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but, after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way.

"Another answer to this ground of defense is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power had been obtained, from the fact of the subscription by the board, to the stock of the railroad company, and the issuing of the bonds. The bonds on their face import a compliance with the law under which they were issued. This bond, we quote, 'is issued in part payment of a subscription of two hundred thousand dollars, by the said Knox county, to the capital stock, etc., by order of the board of commissioners, in pursuance of the third section of act, etc., passed by the general assembly of the state of Indiana, and approved 15th of January, 1849.' The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power."

In *Gelpcke v. City of Dubuque* (1 Wall., 203), the court said: "By these enactments, if they are valid, ample authority was given to the city to issue the bonds in question. The city acted upon this authority. The qualifications coupled with the grant of power con-

tained in the twenty-seventh section of the act of incorporation are not now in question. If they were the result would be the same. When a corporation has power, under any circumstances, to issue negotiable securities the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. If there were any irregularity in taking the votes of the electors, or otherwise, in issuing the bonds, it is remedied by the curative provisions of the act of January 28, 1857. Where there is no defect of constitutional power such legislation, in cases like this, is valid."

In *Meyer v. City of Muscatine* (1 Wall., 384), the court said (p. 393): "It is not questioned that all the parties acted in good faith, and the city cannot now be heard to object to the regularity of its own proceedings. A party taking the bonds was bound to look to the legal authority under which the public agents acted. If that were sufficiently *comprehensive* he had a right to presume that those empowered to act, and acting under it, had complied with its requirements."

In *Pendleton County v. Amy* (13 Wall., 804), the court said: "Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company and bind itself to pay its subscription, or issue its bonds in payment; and if it does the purchaser of such bonds is affected by the want of authority to make them. But it does not follow from this that when the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers, or the people of the county, the bonds can always be avoided in the hands of an innocent purchaser by proof that the county officers or the people have not done, or have insufficiently done, the things which the legislature required to be done before the authority to subscribe or to issue bonds should be exercised. A purchaser is not always bound to look farther than to discover that the power has been conferred even though it be coupled with conditions precedent. If

the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law and what the vote was. When, therefore, they make a subscription and issue county bonds in payment, it may fairly be presumed in favor of an innocent purchaser of the bonds that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfilment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest on the bonds. In the present case it does not appear in the pleadings whether or not the bonds contained any such recitals, nor whether the officers of the county have levied taxes to pay interest on them, or whether any interest has been paid. These grounds of estoppel do not exist. But if such acts and such recitals are sufficient to protect *bona fide* purchasers against an attempt to set up non-compliance with the conditions attached to the grant of power to issue the bonds, it is not easy to see why the pleadings do not show an estoppel in this case. The county received in exchange for the bonds, a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was brought and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange and assert against a purchaser of the bonds for value that though the legislature empowered it to make them and put them upon the market, upon certain conditions, they were issued in disregard of the conditions? We think they cannot and, therefore, that the third plea cannot be sustained."

In *Nugent v. The Supervisors* (19 Wall. 241), where the stock had been subscribed for by resolution, the bonds

issued and a certificate for the stock issued by the railroad company and voted upon, it was held the county was estopped from denying the validity of the bonds in the hands of *bona fide* holders.

As to such estoppel see also *Munson v. Lyons*, 12 Blatchford, 539.

In *City of Lexington v. Butler* (14 Wall., 282), the court said (p. 296): "Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and to issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that when a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." See, also, the elaborate reasoning of the court, pages 294-6.

In *Grand Chute Co. v. Winegar* (15 Wall., 371-3), the bonds were issued to assist in building a plank road. All the previous cases are reviewed, the court saying in conclusion: "In the latter case, the court says that if the legal authority was sufficiently comprehensive, a *bona fide* holder for value has a right to presume that all precedent requirements have been complied with."

In the next case, *Grand Chute Co. v. Winegar* (15 Wall., 373), the court held a suit in equity would not lie to compel the delivery up of such a bond.

In *St. Joseph Township v. Rogers* (16 Wall., 645), the court said (page 665): "Concede, however, that a prior act is insufficient to dispense with the preliminary election, still the concession cannot benefit the defendants, as it is clear that the subsequent act entirely obviates all the mistakes and irregularities in the prior proceedings as it provides that where such informalities and neglect may have occurred, and bonds have been issued, or may hereafter be issued, to aid in the construction of said railroad, no such neglect or omission on the part of township officers shall, in any way, invalidate or impair the collection of said bonds, principal

or interest, as they may respectively fall due. Authorities to support that proposition are hardly necessary. But another answer may be given to the objection quite as satisfactory as either of the others, which is that the 14th section of the act makes it the duty of the supervisor who executed the bonds to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription, and inasmuch as he passed upon that question, and subscribed for the stock, and subsequently executed and delivered the bonds, it is clearly too late to question their validity where it appears, as in this case, that they are in the hands of an innocent holder."

"In *Knox County v. Aspinwall*, non-compliance with one of the conditions was clearly shown, as the notices of the election, as required by law had not been given in any form; but the decision was that the question as to the sufficiency of the notice and the ascertainment of the fact whether the majority of the votes had been cast in favor of the subscription was necessarily left to the inquiry and judgment of the county board, as no other tribunal was provided for the purpose, and the court held that after the authority had been executed, the bonds issued, and they had passed into the hands of innocent holders, it was too late, even in a direct proceeding to call the power in question, and that it was beyond all doubt too late to call the power in question to the prejudice of a *bona fide* holder of the bonds in a collateral way, which is attempted to be done in the case before the court."

In *Starin v. Town of Genoa* (23 N.Y. Rep., 439), the bonds were issued under chapter 375 of the Laws of 1852, p. 593, which provided (sec. 1, p. 594) that the written consents themselves should be "filed in the clerk's office of Cayuga county" so that each purchaser could examine them; and contained no provision like that in some statutes that the affidavits should be "proof" or any evidence of the requisite consents having been given (23 New York Rep., 450), nor was there any provision, as in some statutes, that the bonds should be valid in the hands of *bona fide* holders, or that the town should look to the commis-

1875

Dow v. Black.

J.C.

sioner or his official bond,⁶ nor was there any curative statutes like those of 1863 and 1864, in New York. The statute further expressly *prohibited* the issue of the bonds until the requisite consents were obtained by providing that the commissioners should (Laws 1852, pp. 593-4) "have no power to do any of the acts authorized by this act until * * * the written consent," etc. (23 N.Y. Rep., 441, 449).

In *Starin v. Town of Genoa*, the bonds were delivered to the railroad company for stock without any statute authorizing the same to be done (23 N.Y. Rep., 443, 454-5). The plaintiff purchased the bonds directly from the railroad company with knowledge that they received the same in payment of stock, and that they were consequently invalid (23 N.Y. Rep., 444, 455).

The court distinguish the case from that of *Bank of Rome v. Village of Rome* (18 N.Y. Rep., 20) by saying that in that case the certificate was declared to be evidence of the proper consent (23 N.Y., 452).

In *Gould v. Town of Sterling* (23 N.Y. Rep., 456), the bonds were delivered to the railroad company in payment for stock, and were sold at a large discount (23 N.Y. Rep. 458-461). There was also an express *prohibition* against issuing the stock until the consents had been obtained (23 N.Y. 461); nor did the statute provide for *any evidence of any kind* that the consents had been given (23 N.Y. Rep., 462); there was no provision as to the protection of *bona fide* holders, nor that the town should look to the commissioners and their bonds; nor were there any curative statutes.

People v. Mead (24 N.Y. Rep., 114) was under the same statute as *Starin v. Town of Genoa*, and was decided upon the same grounds.

Notwithstanding the two decisions of the Court of Appeals that the affidavits were no evidence of assent, Judge Grover said, in *People v. Mead*, (36 N.Y. Rep., 229), when it came up on the second appeal: "But for the previous adjudications of this court, I should have held that the affidavit filed with the clerk of Cayuga county, pursuant to the second section of chapter 375, of the Laws of 1852, was *conclusive* evidence of the assent of the tax payers of the town, required by

the act in favor of a *bona fide* purchaser of bonds issued under its provisions.

But those decisions have settled the law of this state otherwise (*Starin v. Town of Genoa*, 23 N.Y. Rep., 439; *People v. Mead*, 24 N.Y., 114). The affidavit must, in accordance with those decisions, be regarded as furnishing no evidence upon that point."

The case of *People ex rel. Drunkirk, etc., v. Batcheller* (53 N.Y., 128), simply holds that, where a statute provides that it shall be lawful for a town to subscribe for railroad stock and issue its bonds, but has not subscribed or issued the bonds, it will not be compelled by mandamus to do so; or, in other words, that an authority to do the act is directory and not mandatory; that the officer designated by the statute has a right to refuse to subscribe for the stock and issue the bonds if he deems best, and the courts will not by mandamus *compel* him to do so.

That case was also put upon the additional ground that the consents were given under a directory statute, giving the officer of the town—the agent of the subscriber—a "*discretion*" (53 N.Y., 132; 2 Laws 1867, p. 1715, § 2), and that the legislature had no right to pervert such language by making the consent mandatory, and depriving such agent of all discretion in the matter.

Judge Grover says (55 N.Y. 135):

"The act of 1867 was a mere enabling act, conferring power upon the several towns embraced therein to issue bonds upon the conditions therein specified to aid the construction of the railroad, etc. It conferred no right upon the railroad company or any one else, where proceedings for bonding had been commenced, to have any further steps taken until bonds had been actually issued under the act. Then such rights were acquired. The railroad company could then enforce the application of the proceeds to the construction of its road, according to its provisions, assuming the act to be constitutional. The consent of the tax payers was given under this act. The entire language of the consent shows that the signers understood the act and their consent as conferring discretionary power upon the supervisor to act upon his views as to the interest of the town. They consent that he may borrow the

sum of \$34,000 upon the faith and credit of the town, etc., and execute bonds therefor; that he may, in his discretion, dispose of such bonds, or any part thereof, and invest the proceeds in the stock of the railroad company, and that he may exercise full and complete powers for said town under the act. Sometimes the word 'may' is construed as 'shall,' but only where the context shows that such was the intention, or where the public have an interest in the exercise of the powers so conferred upon officers, or official boards or tribunals.

"The import of the word, as used in the consent and the act, is to give power, leave, license and permission, not to require or enforce the performance of any one of the specified acts. This view is confirmed by the different language of the acts of 1868 and 1870, relating to the same subject, the latter showing an intention to compel the supervisor to bond the town, and if he failed to sell the bonds at par within thirty days after they were ready for sale, he is not authorized, but required to deliver the bonds to the railroad company upon receipt from it of an amount of stock equal to the principal of such bonds. Under the act of 1867, care was taken that the bonds should not be issued for less than the par value in cash. This would be the result whether the money was borrowed upon the faith and credit of the town, and the bonds given as security, or the bonds sold at not less than par. Thus there would, in case the town was bonded, be secured for the construction of the road, cash equal to the principal of the bonds. If the bonds are delivered to the company upon the receipt of stock to an amount equal to the principal of the bonds, pursuant to the act of 1870, the bonds become the property of the railroad company, and may be sold upon the market much below par, and thus much less money accrue therefrom for the construction of the road.

"It is obvious that the consent given does not embrace any such transaction. Again, the act of 1867, requires that the consent shall be based upon the assessment roll of the year last previous to the issuing of the bonds. This is entirely departed from in the act of 1870. Had there been no subsequent

legislation, it is clear that no bonds could have been issued upon the consent given, and affidavit made after the completion of the roll of 1868. Had bonds been issued under the provisions of the act of 1867, and the town had complied with its provisions, it would not have been liable to pay a tax at any one time to pay more than one year's interest upon the bonds, as none would have accrued prior to the issue; while the act of 1870 requires in effect, that they should bear date and be upon interest from April 25, 1868, the time of filing the consent and affidavit in the town clerk's office, thus subjecting the town to a tax for this back interest in addition to such as should accrue after the issue. No tax payer of the town has ever consented to any such issue of its bonds. The judgment awards a mandamus to the appellant, compelling him to issue bonds according to the requirements of the act of 1870. If the consent of the tax payers, or any part of them, or of any of the town boards or officers, or any of the electors of the town, is necessary, this judgment cannot be sustained, as no such consent has been given to such an issue of bonds as the judgment commands."

Judge Grover then proceeds to show (p. 138-144) that a municipal corporation cannot be compelled by mandamus to subscribe for stock and issue its bonds.

The Supreme Court of the United States has substantially held the same doctrine, that a town cannot be compelled to subscribe for stock and issue bonds therefor, but say that after it has done so the bonds are valid in the hands of bona fide purchasers: *Town of Queensbury v. Culver*, 19 Wall., 83; see *Commissioners v. Shorter*, 50 Ga., 489.

The case of *People v. Batcheller* was reviewed by the court in *Town of Duaneburgh v. Jenkins*, (57 N. Y. 192-5).

In New York it is settled, as above shown, that in the absence of a remedial statute declaring bonds issued by a town board in the construction of a railroad valid, notwithstanding a failure to obtain the assent of a requisite number of tax payers. Even a bona fide holder of such a bond cannot recover without proof that such assent was obtained: *Starin v. Town of*

1875

Dow v. Black.

J.C.

Genoa, 23 N. Y. Rep., 439; *People v. Mead*, 24 N. Y. Rep., 114; *People v. Mead*, 36 N. Y. Rep., 114; where the town filed a bill in equity to compel the cancellation of such bonds on the ground that the requisite consent had not been obtained, it was dismissed on the ground that as the holder though *bona fide* in a suit upon it was bound to show the assent, a transfer could place no other party in a better position; that the fact that the federal courts had held such bonds valid in the hands of *bona fide* holders without proof of proper consent was no reason why a court of equity should compel a cancellation: *Town of Venice v. Gould*, 1 Weekly Dig. 154, Court of Appeals.

Where the legislature provides that the affidavits filed by the railroad commissioner—an officer of the town—should be “PROOF”—conclusive evidence—of the requisite assent; the fact whether such assent had or had not been given cannot be litigated in a collateral action. The remedy, if any, is by *certiorari* to review the action of the commissioner: *Pierce v. Wright*, 6 Lans., 306, 310-312; *Lynde v. The County of Winnebago*, 16 Wall., 6.

In *Pierce v. Wright* (6 Lans., 306), the court held that where a statute makes affidavits and consent of tax payers acknowledged and filed, as required, evidence of the facts therein contained, such facts cannot be attacked collaterally. The remedy, in cases of inaccuracy of the affidavits and consents, is by proceeding to correct the record or set it aside, the court saying (p. 310): “The law makes it evidence of the facts ‘therein contained and certified’ before this court and every other in the state, and for all purposes. The statute does not make it *prima facie* evidence merely, but evidence absolutely and unqualifiedly. The issue which the plaintiff in his complaint tenders is, that this record is a false witness, which does not certify the truth, and should not, therefore, be regarded and acted upon, or held as evidence of the facts, as the statute ordains.

“In other words, we are called upon to say that what the law makes evidence is no evidence; and that public officers shall not act upon it, and perform their duties in accordance with it, as the law requires.

“It is quite obvious that this cannot be done in this way. It would be quite intolerable to allow every tax payer in the town to drag public officers into court in this way, and put them to the expense and trouble of defending the public records, and proving them to be true, should evidence be allowed to be given to the contrary. The plaintiff has plainly mistaken his remedy. Public records cannot be assailed and controverted in this collateral manner.

“His only remedy was by a direct proceeding to correct the record, if it was in any respect incorrect, and reform the character of the statutory witness, so that it should speak ‘the truth, the whole truth, and nothing but the truth, or to set it aside and get rid of it altogether. This principle was established in the case of *The People v. Zeyt* (23 N. Y., 140). It was there held that it could not be proved by parol, in an action, that an official record was not true.

Starkie, in his work on Evidence, thus lays down the rule: ‘Where written instruments are appointed by the immediate authority of the law, or by the compact of the parties, to be the permanent repositories and memorials of truth, it is a matter both of principle and of policy to exclude any inferior evidence from being used, either as a substitute for such instruments or to alter or contradict them’ (2 Stark. 544, 5th Am. ed.) Here the statute has made this record ‘the repository and memorial of the truth,’ and the witness thereof. This principle is entirely consistent with the ruling in the case of *Starin v. The Town of Genoa* (23 N. Y. 439). In that case it was held that parol evidence was competent to show that the written assent of two-thirds of the tax payers of the town had not been obtained, and thus contradict the certificate of the commissioners, expressly upon the ground that the statute in that case had not made the certificate evidence.

But the contrary of that rule, even in the class of cases arising under that statute, has been held in the United States circuit court. Whether the plaintiff’s remedy was by a common law *certiorari*, to bring up the record and proceedings for review, or by some other process to correct or get rid of

the record, it is unnecessary now to decide. It is enough that it cannot be controverted or its verity challenged or put in issue in this way, if, upon its face, it is fair, and in compliance with the statute. This view is in accordance with the decision of the court of appeals in the case of *Howland v. Eldridge* (43 N. Y., 457). The ground of the decision in that case was that the examination of the consents and the assessment roll, for the purpose of ascertaining and determining whether a majority of the tax payers had consented to the bonding of the town, was in the nature of a judicial proceeding, and that the affidavit embodying the determination was conclusive evidence of the fact so ascertained and determined.

The principle is, that the verity of a record or document, or other matter which the law makes evidence, is not an issuable fact, constituting a cause of action, in a collateral action, unless such record, document or other matter is by law made mere *prima facie* evidence, which is not the case under the statute in question. The statute makes the consents, copy of the assessment roll, and affidavit, when filed, evidence, and gives no right of appeal to any other body or tribunal. No one would think of bringing and attempting to maintain an action to prevent the execution of a judgment or decree on the ground that the verdict or finding was against the weight of evidence and contrary to the real facts existing and involved in the issue. And yet this is precisely analogous in principle to such an action."

The commissioner, in determining whether the requisite number of consents had been obtained, and in making his affidavit, acts judicially, and his judicial determination cannot be reviewed in a collateral action. *Certiorari* is the only remedy: *Howland v. Eldridge*, 43 N. Y., 457; *Hyatt v. Bates*, 40 N. Y., 164.

The reviewing and correction of errors in the proceedings and determination of inferior jurisdictions is a matter of legal and not equitable cognizance, and especially where the question is one of power, and there is no allegation of fraud or corruption: *Hayward v. City of Buffalo*, 14 N. Y., 534-539.

The commissioner has access to the

assessments roll of the town, and the means of ascertaining whether or not the requisite majority have signed the proper consent. The statute makes him—one of the officers and agents of the town—the person to officially examine and determine whether tax payers representing a majority of the taxable property have signed the consent, thus guarding against any imposition or unfairness.

After the designated agent of the town has performed this official duty it is filed, and becomes a record of the town, which cannot be varied or disputed by parol evidence: *People v. Zeyt*, 23 N. Y. Rep., 140.

The commissioner's canvass and certificate of an election, by signing a consent, is as conclusive as one by ballot or in any other manner.

It cannot be that the legislature designed to allow the certificate to be vacated or set aside on allegations of mere mistake or inadvertence of the commissioner, independent of fraud or corruption; for, if true, and there were no mistake, it would need no provision that it should be proof; one that it should, would only be required to cover the case of a mistake, and to prevent its being avoided for that reason.

A municipal corporation is as much bound by the acts of its agents as any corporation or person. The reasoning of the Court of Appeals in *People v. Batcheller* (53 N. Y. Rep., 140-3), was based upon this ground. "It is not questioned that all the parties acted in good faith, and the city cannot now be heard to object to the regularity of its own proceedings." *Meyer v. The City of Muscatine*, 1 Wallace, 393; *Van Houten v. Madison City*, 1 id. 297.

When the act provides that "proof" of the consent shall be by affidavit or certificate it is evident the legislature designed to prevent disputes, perjuries and denials of consent, by making the certificate, when filed, conclusive. The agent having given this certificate, the principal—independent of the statute—is estopped from questioning its truth. The railroad company is authorized to rely upon it; cease endeavors to procure any further consent; contract debts for constructing its road on the strength of a valid subscription by the town; and do many other acts which will readily occur to any one.

Being an official act, it would be at least *prima facie* evidence without any provision of the statute that it should be; for, when the statute requires the doing of an official act, and provides that when done it shall become a public record, the record, when perfected, is *prima facie* evidence without any provision that it shall be: *Van Houtrop v. Madison City* 1 Wall., 297.

Unless such a statute renders it conclusive, there is no object for the provision, and the legislature must be held to have done a useless act.

In the *Bank of Rome v. The Village of Rome* (19 N. Y. Rep., 22), the court, per Grover, J., says: "Why require the commissioners to certify to the amount of subscriptions at all, if no effect is to be given to the certificate when made? It cannot be said if this be so, that they would be liable to the defendant for making a false certificate. The defendant would not, in that case, be liable upon the bonds, and consequently would sustain no damage. I think if any thing more than the certificate of the commissioner, as to the subscriptions, their quality or amount, had been necessary by the legislature for the protection of the village of Rome, the act would have provided for it."

So in *Sheboygan County v. Parker* (3 Wall., 96), where the statute provided that the bonds issued in pursuance of it should be "full and complete evidence, both in law and in equity, to establish the indebtedness of the county, according to their tenor and effect," the court held the county could not go behind them.

In *People v. Mitchell* (35 N. Y. Rep., 552), Judge Porter says: "It was within the scope of legislative authority to modify the limitations and restrictions in the antecedent acts on this subject; to prescribe rules of evidence to govern official action; to dispense with prior conditions, and charge the commissioners with defined and imperative duties."

If the legislature could authorize a subscription without a vote of the town; or, after a defective one had been taken, could remedy it by providing that it should not be taken advantage of, it clearly had the power to provide that when certain acts were done, the town might subscribe; that

its action, when so taken, should be conclusive, and no prior defect should be taken advantage of, especially when a public officer of the town was charged and entrusted with the duty of determining when the condition precedent had been performed.

The case of *People v. Brown* (55 N. Y., 198), was a mandamus against a town collector to compel him to pay over moneys collected to railroad commissioners. He was ordered to pay them over, and the court of appeals affirmed the judgment. Judge Allen dissented, holding that as the requisite consents had not been given he ought not to be compelled to do so. In speaking of the statute there under consideration, he says: "The operative effect of an affidavit of a compliance with the statute authorizing the creation of a municipal debt in aid of railroad corporations, where made and filed as required by law, has been incidentally before this court; but in no case has it been held that the affidavit was, under all the circumstances, conclusive and incontrovertible evidence of the facts stated therein, except in the single case of *People v. Mitchell* (35 N. Y. Rep., 551), and then under a statute differing essentially from that under review, and which declared that 'such proof shall be valid and conclusive to authorize such subscription,' etc. (Laws of 1863, chapter 18), and an act amending the same which declared that 'such affidavits shall be valid and conclusive proof, in all courts and for all purposes, to authorize and uphold the respective subscriptions for stock and the issue of bonds,' etc. (Laws 1864, chapter 402). The affidavits were held conclusive because of the peculiar and explicit language of the statute." By chapter 283 of the Laws of 1853, the commissioners, appointed pursuant to the act authorizing the village of Rome to subscribe to the capital stock of the Ogdensburg, Clayton and Rome Railroad were required, before issuing the bonds of the village, to certify that individual subscriptions to the stock, which were made a condition precedent to a subscription by the village had been made in good faith and by persons of ability to pay, and this certificate was held conclusive, and an estoppel as against the village in an action upon the bonds

by a purchaser in good faith and for value: *Bank of Rome v. Village of Rome*, 19 N. Y. Rep., 20.

"This case has been the subject of comment, and distinguished from other cases as they have arisen, and its operation and effect practically restricted to the particular act under which the bonds in suit were issued, and to the case of *bona fide* holders of the bonds for value: *Starin v. Genoa*, 23 N. Y. Rep., 439; *People v. Meade*, 24 id., 114.

"The last case was again before this court and is reported in 36 N. Y. Rep., 224, and it was there held that the affidavit made and filed in pursuance of chapter 375 of the Laws of 1853, that the consents required by the act for the bonding of the towns mentioned therein had been obtained was not conclusive of that fact. The act differs from the Rome act in this, that it does not in terms make the affidavit evidence of the fact. In other courts the question has been presented, but, with the exception of one or two recent cases in the supreme court of this state, it has been presented in actions upon bonds at the suit of *bona fide* holders for value, and the effect has been given to the affidavit claimed for it in these proceedings in favor of such holders: *Chute v. Winegar* 15 Wall., 355.

"The interests of *bona fide* holders of the bonds of the town of Hancock are not involved in these proceedings. What would be the effect of the affidavit of the assessors, as evidence of the facts stated therein, in an action against the town by a *bona fide* holder of the bonds, I do not consider. These proceedings are not in behalf of such holders, and the question whether any, and if any how many, and which of the bonds had come to the possession of *bona fide* holders is left at least in doubt. Certainly no case is made showing that any particular individual is entitled to demand and receive the interest upon any one or more of these bonds, as a *bona fide* holder within the cases of *Bank of Rome v. Village of Rome*, or *Chute v. Winegar*, *supra*. The commissioners, as relators, stand upon their official right and their averment that the statute has been complied with, and the requisite assents obtained. Whatever effect the *bona fide* holders of the bonds may claim for the affidavit, the relators are only entitled to claim for it

the same effect that would be given to proof of the same effect by creditable witnesses in the usual form. It is sufficient but not conclusive proof in their behalf."

But where supervisors were authorized to issue bonds to aid in the construction of a particular railroad, and by an amendment of its charter the corporation was divided into three corporations and the bonds were issued for one of them, it was held that the supervisors had no power to issue them and could not ratify them: *March v. Hulton County*, 10 Wallace, 676.

So where the statute prohibited any corporation except banks from issuing bills to be used as currency, it was held that the city of Richmond had no power to issue such bills, but was expressly prohibited from doing so, and therefore was not liable upon them: *Thomas v. City of Richmond*, 12 Wallace, 349.

So where a municipal corporation, without any legislative authority, issues negotiable paper it is not liable thereon: *Police Jury v. Britton*, 15 Wallace, 566; *Supervisors v. U. S.*, 18 Wallace, 71.

What is work in which the public are interested is sometimes one of delicacy, but it is clear that a manufacturing enterprise of individuals is not of such a character, and that a statute authorizing a town to issue bonds in aid thereof is invalid: *Loan Association v. Topeka*, 20 Wallace, 656; *Weisner v. Village of Douglas*, 6 N. Y. Supreme Court Rep., 514; 4 Hun, 201; affirmed 2 N. Y. Weekly Dig., 50; *Bissell v. Kankakee*, 64 Ill., 249; see also *Sherrard v. Lafayette Co.*, 2 Central L. Jour., 347.

Acts authorizing the issuing of town bonds are complete, and take effect as a law when enacted by the legislature. The condition requiring the consent of a portion of the tax payers is merely a restraint by the legislature upon the exercise of the power conferred: *Starin v. Town of Genoa*, 23 N. Y. Rep., 439; *Gould v. Town of Sterling*, 23 N. Y. Rep., 456; *Bank of Rome v. Village of Rome*, 18 N. Y. Rep., 38.

In some cases the legislature provide that a failure to obtain the requisite consent shall not invalidate the bonds, and make the affidavits filed *conclusive* evidence, and render the subscription and the bonds legal and valid.

Thus in New York, by chapter 18, Laws 1863, p. 30, § 1, it is provided as follows:

"§ 1. In any case where the commissioner or commissioners of any town, authorized to subscribe to the stock of the Albany and Susquehanna Railroad Company, shall have filed in the town and county clerk's offices proof, by affidavit, of the consent of a majority of the tax payers, their heirs or legal representatives of such town, preliminary to a subscription on behalf of said town to the stock of said company, such proof by affidavit shall be *valid and conclusive* to authorize said subscription to the stock, and the issue of bonds to the amount specified in such proof; and clerical or other defects in such proof by affidavit shall not invalidate it." And by chapter 402, Laws 1864 (p. 911), as follows:

"§ 1. In any case where the commissioner or commissioners of any town, authorized to subscribe to the stock of the Albany and Susquehanna Railroad Company, shall have filed in the town and county clerk's offices, affidavits of the consent, subscribed or authorized to be subscribed, of a majority of the tax payers, their heirs or legal representatives of such town, respectively, preliminary to a subscription on behalf of said town to the stock of said company, such affidavits shall be *valid and conclusive* proof, in *all courts* and for *all purposes* to authorize and uphold the respective subscriptions to the stock; and the issue of bonds to the amount specified in such proof, for such towns, respectively, and no clerical or other defects in any of such affidavits, shall invalidate such proof, or the subscription to the stock or the said bonds. And where bonds have been issued by the commissioner or commissioners of any town, and the said railroad shall have been constructed through such town, the bonds shall be valid and binding on said town, without reference to the form or sufficiency of such affidavits, and the principal and interest on the bonds shall be levied, raised and paid in the manner provided in the original act." That "when the bonds shall have been *issued*, and the railroad shall have been constructed through the town, *the bonds shall be valid and binding on said town,*

without reference to the form or sufficiency of such affidavits."

And this, "however defective in form or substance:" *People v. Mitchell*, 35 N. Y. Rep., 552, 553.

In other words, where there has been an attempt at compliance, if the town has the benefit of the road, it shall pay its proportion toward the construction.

As soon as the restrictions as to consent are thus removed, the statute stands as if it had never been a part of it: *Fort Plain Bridge Co. v. Smith*, 30 N. Y. Rep., 44; *People v. Clarke*, 53 Barb., 178, 179.

"It is competent for the legislature to ratify and confirm issues of bonds previously made, and it seems to authorize town authorities to issue bonds without a vote of the people:" *Portsmouth, etc., v. Town of Yellowhead*, 3 Bissell, 474, 476-479.

The New York statutes of 1863 and 1864 have been twice considered and passed upon by the court and the commission of appeals.

The case of *People v. Mitchell* (35 N. Y. Rep., 551), was a mandamus against the commissioner of the town of Summit to compel him on behalf of his town to subscribe for the stock of the railroad company and issue the bonds of the town therefor.

The court said: "The precise purpose and effect of the confirmatory legislation, of which the defendants complain, was to cure all such defects as those, on which they rely to justify them in disobeying the statute (Laws of 1863, 30: Laws of 1864, 911). It was within the scope of legislative authority to modify the limitations and restrictions in the antecedent acts on this subject, to prescribe rules of evidence to govern official action, to dispense with prior conditions, and to charge the commissioners with defined and imperative duties. Our clear conclusion is, that it was the intention of the confirmatory acts to make the affidavits of consent, then on file in the clerks' offices of the respective towns and counties, however defective in *form or substance*, 'Valid and conclusive proof in all courts and for all purposes to authorize and uphold the respective subscriptions to the stock and the issue of bonds to the amount specified in such proof for such towns,

respectively.' This purpose is apparent from the further provisions that no defects 'in any of such affidavits shall invalidate such proof,' and that 'the bonds shall be valid and binding on said town without reference to the form or sufficiency of such affidavits' (Laws of 1864, 911). The commissioners were not left at liberty either to go behind the affidavits, or to allege their insufficiency. The statute relieved them from all responsibility, by providing that 'such proof by affidavit shall be valid and conclusive to authorize such subscription to the stock, and the issue of the bonds to the amount specified in such proof' (Laws of 1863, 30, § 1). The objection that these acts are in conflict with the federal constitution has been disposed of by the decision of the ultimate appellate tribunal."

It was said by counsel in the case of *The Town of Duaneburgh v. Jenkins*, (57 N. Y. Rep., 177), that although the court of appeals, in the case of *People v. Mitchell* (35 N. Y. Rep., 551), decided that bonds issued without proper consent were valid, that that case *might* have been determined upon other grounds.

It is settled, if anything can be regarded as settled, that "where two or more points are discussed in the opinions delivered on the decision of a cause, and the determination of either point in the manner indicated in such opinions would authorize the judgment pronounced by the court, the judges concurring in the judgment must be regarded as concurring in such opinions upon all the points so discussed, unless some dissent is expressed or the circumstances necessarily lead to a different conclusion:" *James v. Patten*, 6 N. Y. Rep., 9; *Oakley v. Aspinwall*, 13 N. Y. Rep., 500; *New York, etc., v. Schuyler*, 8 Abb., 239.

The case of *The Town of Duaneburgh v. Jenkins* (57 N. Y. Rep., 177), was an action brought by the town of Duaneburgh, against Jenkins, the commissioner, and the Albany and Susquehanna Railroad Company, to restrain the issuing and delivery of the bonds of the town. Before the commencement of the suit the road had been constructed through the town of Duaneburgh and was in operation (57 N. Y. Rep., 180, 185). Jenkins, the commissioner, had subscribed for the

stock, and issued the bonds to the railroad company, and \$15,000 of them had been sold to *bona fide* holders (57 N. Y. Rep., 179), and the balance were so sold before the trial (57 N. Y. Rep., 180). The commission, by Judge Johnson, in an elaborate opinion held that the bonds were valid, and that the action would not lie (57 N. Y. Rep., 184-195).

In *Hassan v. The City of Rochester* (6 Lansing, 185), a section of the charter of the city of Rochester (Laws 1861, p. 335, § 208, 6 Lansing, 191), legalizing past and future assessments validating all defects was held to render all former and future assessments valid (6 Lans. 191, 192). A motion was made for a re argument when the court said (p. 197): "The learned counsel who applied for re argument has failed to suggest any satisfactory reason for holding that the provisions of section 208 of the charter which declares that all assessments made after the passage of the act of which it forms a part, for local improvements, shall be and are thereby declared to be valid and effectual, notwithstanding any irregularity, omission or error in the proceedings relating to the same, does not apply and cure all irregularities and omissions in the assessment under consideration.

"This is an assessment for a local public improvement made after the passage of the charter, and it is, therefore, within the very words of the section. If it does not apply to this assessment, and cure all irregularities, and omissions, and errors in it, then it is senseless and unmeaning."

In *Beloit v. Morgan*, (7 Wall., 619), the statute carved out a portion of the town of Beloit and created thereof the city of Beloit. It provided that "all principal and interest upon all bonds which have been heretofore issued by the town of Beloit, for railroad stock or other purposes, shall be paid when the same, or any portion of the same, shall fall due, by the city and town of Beloit, in the same proportion as if said town and city were not dissolved, such proportion to be apportioned," etc. It was held that this provision made all bonds issued by the town valid, assuming that previously to the act they were not so, the court saying (pp. 623, 624): "The language used by the legislature

1875

Dow v. Black.

J.C.

is clear and explicit. No gloss can raise a doubt as to its meaning. It distinctly affirms, and the affirmation is repeated that the bonds shall be paid. The only point to be considered is the effect of this provision. That is not an open question in this court. Whenever it has been presented, the ruling has been that, in cases of bonds issued by municipal corporations, under a statute upon the subject, ratification by the legislature is in all respects equivalent to original authority, and cures all defects of power, if such defects existed, and all irregularities in its execution: *Gelpecke v. Dubuque*, 1 Wall., 220; *Thompson v. Lee County*, 3 id., 327.

"The same principle has been applied in the courts of the states: *Wilson v. Hardesty*, 1 Md. Ch. Decisions, 66; *Shaw v. Norfolk Co. R. R. Co.*, 5 Gray, 180.

"This court has repeatedly recognized the validity of private and curative statutes, and given them full effect where the interests of private individuals were alone concerned, and were largely involved and affected: *Saterlee v. Matthewson*, 2 Peters, 380; *Wilkinson v. Leland*, Id., 627; *Leland v. Wilkinson*, 10 id., 294; *Watson v. Mercer*, 8 id., 88; *Charles River Bridge v. Warren Bridge*, 11 id., 420; *Sturdy v. Colt*, 5 Wall., 119; *Croxall v. Sherred*, Id., 268.

"The earlier and more important of these authorities are so well known to the profession, and are so often referred to, that it would be waste of time to comment upon them. We hold this objection also fatal to the appellant's case."

In *St. Joseph Township v. Rogers* (16 Wallace, 645), it was held that a similar statute (16 Wallace, 647), obviated all the mistakes and irregularities in the prior proceedings, the court saying (p. 662):

"Repeated decisions of the state courts have established the rule that the legislature has the constitutional right to authorize municipal corporations to subscribe for the stock of a railroad company, and to issue their bonds to aid in the construction of such an intended improvement; that the supervisors of the municipality have the power, in case such a subscription is authorized, to subscribe for the stock of the railroad company and to call an

election to ascertain the will of the legal voters in that behalf: *Prettyman v. Supervisors*, 19 Ill., 406; *Robertson v. Rockford*, 21 id., 451; *Perkins v. Lewis*, 24 id., 208; *Johnson v. Stark*, 24 id., 85; *Keithsburg v. Frick*, 34 id., 405; *Commissioners v. Nichols*, 14 Ohio St., 260.

Such corporations are created by the legislature and they derive all their powers from the source of their creation, and those powers are at all times subject to the control of the legislature. Everywhere the construction and repair of highways within their limits are regarded as among the usual purposes of their creation, and the expenses of accomplishing those objects are among their usual and ordinary burdens. Railways also, as matter of usage founded on experience, are so far considered by the courts as in the nature of improved highways and as indispensable to the public interest and the successful pursuit even of local business, that the legislature may authorize the towns and counties of a state through which the railway passes, to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same to aid the railway company in constructing or completing such a public improvement. Legislation of the kind may be prohibited by a state constitution, but it is settled everywhere that such an act is not in contravention of any implied limitation of the power of a state to pass laws to promote the usual purposes of municipal corporations: *Rogers v. Burlington*, 3 Wall., 663; *Freeport v. Supervisors*, 41 Ill., 495; *Butler v. Dunham*, 27 id., 474.

Arguments to show that defective subscriptions of the kind may, in all cases, be ratified where the legislature could have originally conferred the power is certainly unnecessary, as the question is authoritatively settled by the decisions of the supreme court of the state and of this court in repeated instances: *Couyill v. Long*, 15 Illinois, 203; *Keithsburg v. Frick*, 34 id., 405; *Thompson v. Lee County*, 3 Wall., 327; *City v. Lamson*, 9 id., 477; *Watson v. Mercer*, 8 Pet., 111; *Bissell v. Jeffersonville*, 24 How., 205."

In the *City of Kenosha v. Lamson* (9 Wall., 478), the court said (page 485): "It is insisted that the statute exceeds

the authority of the legislature, under the third section of the eleventh article of the state constitution, which, it is asserted, requires the legislature to limit or restrict the amount of money to be raised by the city. Without inquiry into this question, it is sufficient to say that, after the city had passed the ordinance lending its credit to the railroad company to the amount of \$100,000, the legislature ratified it. This was equivalent to an original limit of this amount."

In *Thompson v. Lee County* (3 Wall., 327), it was held a statute validating bonds similar to those in question (page 331): "If the legislature possessed the power to authorize the act to be done, it could, by a retrospective act, cure the evils which existed, because the power thus conferred had been irregularly executed. The question with the legislature was one of policy, and the determination made by it was conclusive."

In the *Matter of Protestant, etc.* (46 N. Y. Rep., 178), the court held that an assessment for a sewer not constructed in accordance with a general plan, though advertised before the law requiring it to be so constructed was passed, was illegal. The legislature, by chapter 350 of the Laws of 1872, declared that no prior assessment for building such a sewer should be held to be invalid if the commissioners should certify that no fraud had been committed in respect thereto. They so certified. This court held the prior illegality and invalidity was cured, and that such prior assessment was thus made legal and valid: *Matter of Meyer*, 50 N. Y. Rep., 504.

The legislature has the power to prescribe what shall be evidence of a particular fact, even where it affects the property of individuals: *Hand v. Ballou*, 12 N. Y. Rep., 543; *Hickox v. Tallman*, 38 Barb., 608; *Forbes v. Halsey*, 26 N. Y. Rep., 63; *Neass v. Mercer*, 15 Barb., 318; *Stocking v. Hunt*, 3 Denio, 274.

And certainly where no private right is invaded: *People v. Mitchell*, 35 N. Y. Rep., 552; *Thompson v. Lee County*, 3 Wall., 327.

"When, however, by the operation of existing laws, a contract cannot be enforced without some new action of a party to fix his liability, it is as compe-

tent to prescribe by statute the requisites to the legal validity of such act as it would be in any case to prescribe the legal requisites of a contract to be thereafter made. Thus, though a verbal promise is sufficient to revive a debt barred by the statute of limitations or by bankruptcy, yet this rule may be changed by a statute making all such future promises void unless in writing: *Joy v. Thompson*, 1 Doug. (Mich.), 373; *Kingalev v. Cousins*, 47 Me., 91. It is also equally true that where a legal impediment exists to the enforcement of a contract which parties have entered into, the constitutional provision in question will not preclude the legislature from removing such impediment, and validating the contract. A statute of that description would not impair the obligation of contracts, but would perfect and enforce it: *Welch v. Wadsworth*, 30 Conn., 149; *Curtis v. Leavitt*, 15 N. Y. Rep., 9; *Wood v. Kennedy*, 19 Ind., 68. And for similar reasons the obligation of contracts is not impaired by continuing the charter of a corporation for a certain period, in order to the proper closing of its business: *Foster v. Essex Bank*, 16 Mass., 245." Cooley's Const. Lim. (2d ed.), 293-4.

The power of the legislature to impose taxes is unlimited: *People v. Batcheller*, 53 N. Y. Rep., 142-3; *Litchfield v. Vernon*, 41 id. 123, 134, 141; *Litchfield v. McComber*, 42 Barb., 288, 289; *Howell v. City of Buffalo*, 37 N. Y. Rep., 267, 270-74; *Brewster v. City of Syracuse*, 19 N. Y. Rep., 116.

The building of the railroad is such a public improvement that the legislature has a right to allow a town to assist in its construction: *People v. Batcheller*, 53 N. Y. Rep., 138; *Bank of Rome v. Village of Rome*, 18 N. Y. Rep., 38; *Grant v. Courter*, 24 Barb., 232; *Bloodgood v. Railroad Co.*, 18 Wend., 9; *Clark v. City of Rochester*, 24 Barb., 494; *Matter of Trustees*, 31 N. Y. Rep., 574; *Litchfield v. McComber*, 42 Barb., 288; *Matter of Townsend*, 39 N. Y. Rep., 173; *Litchfield v. Vernon*, 41 N. Y. Rep., 123, 134, 141; *Town of Queensbury v. Culver*, 19 Wall. 83, New York case; *St. Joseph Township*, 16 Wallace, 662; *Railroad Co. v. County of Otsego*, 16 id., 667; *Township of Pine Grove v. Talcott*, 19 id., 666; *Gelpecke v. City of Dubuque*, 1 id., 175, 203.

And this with or without a popular vote. And can provide that no defect should invalidate proceedings already attempted: *Thompson v. Lee County*, 3 Wallace, 827; *People v. Mitchell*, 35 N. Y. Rep., 552; *Matter of Trustees*, 81 N. Y. Rep., 574; *Campbell v. City*, 5 Wallace, 203; *St. Joseph Township v. Talcott*, 16 Wallace, 663.

The legislature are the sole judges as to what restrictions shall be placed upon the issuing of the bonds: *Bank of Rome v. The Village of Rome*, 18 N. Y. Rep., 88.

A statute authorizing a town in its corporate capacity, to issue its bonds, and with them purchase and hold the stock of a railroad company, even though the act contemplate, in a contingency, taxation to reimburse the debt, is valid and constitutional, and does not in any sense deprive a resident of the town of his property, or take it for public use, without just compensation. The citizen is not deprived of his property, nor is any taken from him for the public use, nor is the property of the tax payer affected, except contingently and remotely: *Howell v. City of Buffalo*, 37 N. Y. Rep., 267-9; *Grant v. Courter*, 24 Barb., 232; *People v. Lawrence*, 36 id., 177; *Bank of Rome v. Village of Rome*, 18 N. Y. Rep., 88; *Benson v. Mayor, etc., of Albany*, 24 Barb., 252.

Even though the tax be imposed after the debt be created or improvement be made: *Howell v. City of Buffalo*, 37 N. Y. Rep., 267-9.

The clause in the constitution prohibiting the taking of private property for public purposes without compensation, applies only to the right of eminent domain: *Howell v. City of Buffalo*, 37 N. Y. Rep., 267-9; *Gilman v. City*, 2 Black, 513; *People v. Griffin*, 4 N. Y. Rep., 419; *Darlington v. Mayor*, 31 N. Y. Rep., 190.

A statute, by providing that the bonds of a town shall not be issued until a specified number of tax payers shall consent in writing, does not constitute a contract with the town; it is still entirely competent for the legislature to provide that the bonds shall be issued, or the bonds having been issued,

shall be valid and binding, notwithstanding such tax payers have not consented: *Town of Guilford v. Supervisors of Chenango*, 13 N. Y. Rep., 143; *Brewster v. City of Syracuse*, 19 N. Y. Rep., 116; *Schenectady City Bank v. Davis*, 16 Barb., 188; *Schenley v. Commonwealth*, 36 Penn. St., 29; *Savings Bank v. Allen*, 28 Conn., 97; *Welch v. Silliman*, 2 Hill, 491.

A statute declaring valid the bonds of a town, without reference to a compliance with the conditions mentioned in a former statute, does not impair any vested right: *People v. Roper*, 35 N. Y. Rep., 633; *Ohio Life Ins. Co. v. Debolt*, 16 How. U. S., 435-8; *Town of Queensbury v. Culver*, 19 Wall., 83; *Aspinwall v. Commissioners*, 22 How. U. S., 364, 376-379; *Gilman v. City*, 2 Black, 510; *Butler v. Pennsylvania*, 10 How. U. S., 416; *East Hartford v. Hartford Bridge Co.*, 10 How. U. S., 511; *State v. B. & O. R. R.*, 3 How. U. S., 534.

The only manner in which a town can be injuriously effected by the issuing of the bonds would be in subjecting its citizens thereby to taxation. Such an assessment would not be an exercise of the right of eminent domain, but the power of taxation, and neither the town or its citizens can be said to have acquired a vested right against the unlimited and unrestricted taxing power of the legislature.

"The power of taxation was committed by the people to the government to be exercised, and not to be alienated." *People v. Roper*, 35 N. Y. Rep., 629; *Howell v. City of Buffalo*, 37 N. Y. Rep., 271.

Where the highest courts of a state have, when an agreement is made, construed their constitution and laws so as to give the agreement force and vitality, the same courts cannot by a subsequent and contrary construction, render it invalid: *City of Kenosha v. Lamson*, 9 Wall., 478; *Thompson v. Lee County*, 8 id., 327; *Lee County v. Rogers*, 7 id., 181; *Woodruff v. Woodruff*, 52 N. Y. Rep., 53; *Miller v. Tyler*, 58 N. Y. Rep., 477; *Lindsay v. Lindsay*, 47 Ind., 283; *Harris v. Jer.*, 55 N. Y. Rep., 421, S. C. 14 Am. Rep., 285, and see note 288.

[Law Reports, 6 Privy Council Cases, 283.]

J.C. (¹), Jan. 23, 28, 29; March 16, 1875.

***OUR SOVEREIGN LADY THE QUEEN, Appellant; and [283
HENRY CLARK MOUNT and WILLIAM CHARLES MORRIS,
Respondents.**

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Habeas Corpus—Penal Servitude for Offences triable by Colonial Courts under their Admiralty Jurisdiction—16 & 17 Vict. c. 99, s. 6.

M. and M., convicted at the sessions of the Supreme Criminal Court of Victoria, of manslaughter committed on board a British ship on the high seas, were sentenced to penal servitude for fifteen years, and were subsequently detained in a public gaol within the meaning of the Colonial Act, the Statute of Gaols, 1864. On a return to a writ of *habeas corpus*, to the effect that M. and M. were detained "for the cause and to the end that they may undergo the sentence aforesaid," the court ordered that the prisoners "be discharged from their imprisonment and set at large," on the ground that, by 16 & 17 Vict. c. 99, s. 6, sentence of penal servitude could not be carried into execution in the colony without the intervention of the Secretary of State.

Held, by the Privy Council that the return was sufficient; and that in any case the court erred in not remanding the prisoners until it was clear that no lawful means of executing the sentence could be found.

Rez v. Allen (²) distinguished.

Although the act (12 & 13 Vict. c. 96) under which the Supreme Court obtained jurisdiction over the prisoners only authorized a sentence of transportation according to the law of England then in force, and although 20 & 21 Vict. c. 3, which abolished transportation, and substituted penal servitude, does not in terms include the colonies, yet this latter act is applicable to the colonies with respect to the sentences to be passed on persons convicted in the colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the former act on Colonial Courts. The policy of the former act was to authorize the Colonial Courts to try offences properly cognizable in England, with the consequences which would have attended a trial there; and that policy, in the absence of an expressed intention to the contrary, must govern the construction of both acts. The direction in 16 & 17 Vict. c. 99, s. 6, that the Secretary of State "should point out the place of confinement in case [284] of a person sentenced to penal servitude, relates only to the manner of executing the sentence, and to matters of administration, and therefore need not be resorted to in the case of sentences passed in the colonies, which may be executed according to the local procedure.

Under the combined effect of Imperial and Colonial legislation sentences of penal servitude may be executed in Victoria; were this otherwise, a sentence directed by an Imperial act may not be treated as null, because no means have been previously provided in the colony for carrying it into effect.

THIS was an appeal from a judgment of the Supreme Court of the Colony of Victoria upon the return to a writ of *habeas corpus ad subjiciendum* to bring up the bodies of the respondents, and a motion made thereon that the respondents should be discharged out of custody.

(¹) *Present*: SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(²) 3 E. & E., 338.

The respondents were informed against for murder on the high seas, under the authority of an Imperial statute 12 & 13 Vict. c. 96, which provides that the courts in any colony shall have the same authority to try prisoners for offences committed on the sea or any place within Admiralty jurisdiction as if such offences had been committed within the jurisdiction of the Colonial Court; and, by sect. 2, that "if any person shall be convicted before any such court of any such offence, such person so convicted shall be subject and liable to, and shall suffer all such and the same pains, penalties, and forfeitures as by *any law or laws now in force*, persons convicted of the same respectively would be subject and liable to in case such offence had been committed and were inquired of, tried, heard, determined, and adjudged in England."

The respondents were convicted of manslaughter, and sentenced respectively to fifteen years' penal servitude; in accordance with the following opinion of the judges:

"The judges are of opinion that the prisoners cannot be sentenced to transportation, but may be sentenced to be kept in penal servitude for life, or for any term not less than seven years. The execution of that sentence would seem to be a matter of Imperial duty, as the place in which the prisoners are to be confined depends upon the directions of one of Her Majesty's Principal Secretaries of State (16 & 17 Vict. c. 99, s. 6)."

After the passing of the said sentence the respondents were removed to, and confined in custody at, Her Majesty's 285] gaol at *Melbourne, then being a penal establishment within the meaning of the Statute of Gaols Act, 1864, and afterwards, on the 20th of May, 1873, the Inspector-General of Penal Establishments directed, by warrant under his hand, that the respondents should be removed to Her Majesty's gaol at Pentridge, being also a penal establishment within the meaning of the said Statute of Gaols, 1864, there to be detained until the expiring of their sentence, or until discharged or removed by lawful authority, and the respondents were to have been removed to Her Majesty's gaol at Pentridge.

Afterwards, on the 12th of December, 1873, a writ of *habeas corpus ad subjiciendum* was issued out of the Supreme Court, directed to the Inspector-General of Penal Establishments, requiring him to bring up the bodies of the two respondents, and the Inspector-General of Penal Establishments, on the 16th September 1873, made the following return:

"I, George Oliphant Duncan, Inspector-General of Penal Establishments in the Colony of Victoria, do hereby certify and return in obedience to this writ, that before the coming of the said writ to me, to wit, on the 15th day of April, in the year of our Lord 1873, I did take into custody, and still retain in custody in gaol, the said Henry Clark Mount and William Charles Morris, under and by virtue of a certain sentence of the Supreme Court of General Gaol Delivery, holden at Melbourne on the 19th day of December, in the year of our Lord 1872, delivered in open court (the said court being then sitting) for a certain felony, that is to say, manslaughter on the high seas, whereof the said Henry Clark Mount and William Charles Morris had been by the said court then and there respectively tried and convicted, which said sentence is that each of them, the said Henry Clark Mount and William Charles Morris, should be kept in penal servitude for the period of fifteen years; and I do further certify that the said Henry Clark Mount and William Charles Morris are now detained in my custody, *for the cause and to the end* that they may undergo the sentence aforesaid.

"Geo. O. Duncan."

The return having been read and filed, a motion was made that *the prisoners be discharged on the ground that [286 they were not in the proper custody.

After the hearing of the motion, the court delivered a judgment, in which they held that the return was bad; on the ground, among others, that by sect. 6 of the Imperial Statute, 16 & 17 Vict. c. 99, the sentence of penal servitude could not be carried out in any gaol in the colony without the direction of one of Her Majesty's Principal Secretaries of State. An order of the Supreme Court, dated the 17th of September, 1873, was accordingly made, ordering the discharge of the respondents.

The judgment of the Supreme Court was as follows:

"On its having been read, it was contended that the return was bad on several grounds. It is not our intention to notice more than one of the objections, namely, that to justify the detention it ought to appear by the return either that the prisoners are held in safe custody until they can be sent to a prison where the sentence of penal servitude passed on them can be carried out, or that they are now in a prison in which, according to the provisions of 16 & 17 Vict. c. 99, s. 6, one of Her Majesty's Principal Secretaries of State had directed that the sentence should be carried out. In sup-

port of the return it was argued by Mr. Attorney-General that the sentence of penal servitude could not be carried out in any gaol in Victoria without any direction from a Secretary of State, that it could not be distinguished from imprisonment with hard labor; and by Mr. Adamson, who was with him, that it appeared by the return that the prisoners were merely detained until they could be sent to a prison directed by the Secretary of State, to the end that they might undergo the sentence there. According to these arguments, the return has two diametrically opposite meanings. By the first the return conveys to the court beyond all doubt that the prisoners are now actually undergoing punishment in accordance with the terms of their sentence; by the last it equally clearly appears, that they are awaiting the execution of the punishment. The contradictory nature of these arguments, though of itself no objection to either, makes it incumbent on the court to scrutinize carefully the language of the return. Either of these meanings could have been stated in terms which would admit of no doubt.

387] *So far, however, from this having been done, the return would seem to have been advisedly drawn so as to be susceptible of two, if not of three, different meanings, without distinctly discovering the facts of the case. If it be true that the Secretary of State has directed the sentence to be carried out in the gaol in which the prisoners are detained, nothing would have been easier than to have said so, or if an application had been made to the Secretary of State for his direction, and he had not yet given one, it would have been equally easy to have set that out, as was done in the return in *Leonard Watson's Case* (1), and to add that they were necessarily detained until they could be sent to such a prison as the Secretary of State should direct under the statute. But the principles applicable to such returns as the present, by which they are interpreted in favor of the liberty of the subject, are that while a return would not be held invalid for mere want of form (*Rex v. Bethel* (2)), it ought to be direct, certain, and clear, and show a good *corpus delicti* and a sufficient detainer (*Souden's Case* (3) *Deybel's Case* (4)); which is not to be established by inference nor by a conclusion of law, without setting out the facts or proof from which the court may draw the conclusion: *Nash's Case* (5). We will not, therefore, indeed we cannot, assign to this return either of these meanings, but read it in the

(1) 9 A. & E., 731.

(4) 4 B. & A., 243.

(2) 5 Mod., 19.

(5) *Ibid.*, 295.

(3) 4 B. & E., 294.

sense in which, according to the contention of the Attorney-General, it was good, which seems to be its proper interpretation.

"It is necessary, therefore, to consider whether the proposition laid down by him, that penal servitude can be carried out in any gaol without the direction of the Secretary of State, can be supported. We are of opinion that it cannot. The punishment of transportation could not have been enforced unless the king in council appointed the places to which offenders were to be transported, nor unless the Secretary of State specified which of the places so appointed each particular offender was to be sent to (5 Geo. 4, c. 84, s. 3). A sentence of penal servitude, whether passed in the United Kingdom or in a colony, requires the same preliminary act of a Secretary of State (16 & 17 Vict. c. 99, s. 6). *Without it the sentence cannot be put into execution. [288 In cases of penal servitude it ascertains the place where the hard labor is to be performed, just as in ordinary cases the sentence of the court ascertains the gaol in which imprisonment is to be undergone; and although the discipline to which the prisoners are subjected may be, as was urged by the Attorney-General, the same as if the Secretary of State's direction had been obtained, the imprisonment which the prisoners are now undergoing is not in accordance with the sentence passed upon them, nor is it in any way subservient or auxiliary to its execution. It was submitted that the prisoners should be remanded. If we could see by the return that measures had been adopted to procure the Secretary of State's direction as to the place of imprisonment we might remand them, as was done in *Ex parte Krans* ('); but, as it has been contended that no such direction is necessary, it is to be assumed that no application has been or will be made for such direction. A remand would therefore be oppressive, and in contravention of the law, as we understand it to be. We are of opinion that the return is bad, and that the prisoners must be discharged."

From this judgment the appeal in this case was brought by the Attorney-General for the Colony of Victoria, on behalf of the Crown.

Mr. J. F. Stephen, Q.C., and Mr. C. Bowen, for the Crown, said that the prisoners were tried under 12 & 13 Vict. c. 96, the second section of which subjected them on conviction to the same punishment that they would have been liable to in England in 1849, that is, a maximum punishment of transportation for life, or four years' imprisonment

(') 1 B. & C., 258.

under 9 Geo. 4, c. 31. The first point was that the court inflicted a sentence of fifteen years' penal servitude. [Mr. Field, Q.C., gave up the objection that there was no power to pass such sentence, first, because on the authorities that was, perhaps, not a matter to be entertained upon *habeas corpus*; and secondly, an act had been subsequently passed authorizing such punishment. His objection was that the place of confinement was not appointed by the Secretary of State, and that the person detaining showed no authority so 289] to do.] The points, then, *are, first, that the Secretary of State's order was unnecessary; secondly, that in any event the prisoners were not entitled to discharge but should have been remanded to custody for the purpose of obtaining the Secretary of State's order. The question turns on 16 & 17 Vict. c. 99, s. 6. To explain it they referred to the Imperial acts, 5 Geo. 4, c. 84, 16 & 17 Vict. c. 99, 20 & 21 Vict. c. 3, and 27 Vict. c. 5. So much of these acts as in this particular case authorized a sentence of penal servitude is applicable to the colonies, otherwise their operation is entirely confined to prisoners sentenced by the courts of the United Kingdom. The directory and executive parts of the statutes apply to convicts sentenced in the United Kingdom, not to convicts sentenced in the Colonial Courts, so far, at all events, as those sentences were to be executed in the colonies. Penal servitude under the latter statutes is exactly the same as transportation under the old ones. The only difference between 5 Geo. 4, c. 84, which consolidated the law as to transportation, and the two penal servitude statutes of Victoria is this, that the former treat transportation as the rule and penal servitude as the exception; and, on the other hand, the later statutes treat penal servitude as the rule, and transportation as the exception. Under 5 Geo. 4, when a person is sentenced to transportation he may either be transported at once, or confined at home for the whole or any part of the term. The sentence of transportation really meant compulsory labor, either at home or abroad; and with the exception of sect. 17, the whole statute presupposed a sentence in England on a person convicted in England. Sect. 17 alone can be said to deal with sentences passed by Colonial Courts, and only then when the prisoners are brought to England under those sentences.

As to 16 & 17 Vict. c. 99, the first four sections are repealed. The prisoners have been discharged because sect. 6 is supposed not to have been complied with. That act, with the act of Geo. 4, referred to the punishment of persons tried and sentenced to penal servitude by the courts of

Great Britain. 12 & 13 Vict. c. 96, gives a general power to Colonial Courts with reference to transportation; and 20 & 21 Vict. c. 3, abolishes transportation. The sentence in this case was not really passed under 16 & 17 Vict. c. 99, in such a sense that it ought in all *respects to conform to its [290 provisions. Incidentally it enabled the sentence to be passed, but its ministerial and executive provisions are meant for persons convicted in Great Britain: see sect. 8 of 20 & 21 Vict. c. 3, passed to amend this act. [Mr. *Field* said that under the circumstances of this case there was no power of detention, except under sect. 6 of 16 & 17 Vict. c. 99.] Penal servitude has come to mean being kept to work in England, and 16 & 17 Vict. c. 99, enabled the Secretary of State to appoint Gibraltar or Bermuda as places of confinement for convicts so sentenced. Sect. 6, with reference to prisons which were to be appointed abroad, enabled the Secretary of State, when the colonies objected to transportation, to use military stations as places of confinement. It is contrary to the policy of the act and all the legislation on the subject to construe sect. 6 as necessitating an application to the Secretary of State before the government of Victoria could legally confine a convict sentenced to penal servitude by the Supreme Court of Melbourne in Pentridge Gaol. The Colonial Government is, of course, bound to guard its constitutional rights, and not to call on the Secretary of State to interfere unnecessarily in the internal administration of the colony. The whole of the power, moreover, is discretionary in the Secretary of State. Under sect. 8 a like power is given to the Lord Lieutenant of Ireland, thus intercepting in that country the exercise of that power which it is said is necessary in Victoria.

The 20 & 21 Vict. c. 3, shows that 16 & 17 Vict. c. 99, is confined to persons sentenced in the United Kingdom. Sect. 3 of that act extends to those cases only where persons are confined in places beyond the seas appointed either under 16 & 17 Vict., or under 5 Geo. 4, c. 84. The joint effect of the two acts might be thus illustrated. Under sect. 6 of 16 & 17 Vict. c. 99, a convict might be sent to Portland or Gibraltar, appointed under that act, one in and the other out of the United Kingdom; or he could be sent to Chatham, appointed in the United Kingdom under 5 Geo. 4, but not to Van Diemen's Land, appointed under 5 Geo. 4, out of the United Kingdom. By 20 & 21 Vict. c. 3, s. 3, such a convict might be sent, if the Secretary of State thought proper, not only to Portland, Gibraltar, or Chatham, but also to Van Diemen's Land. The effect of the acts is to provide

291] for the *punishment of offenders sentenced in the Home Courts, and no others. It is absurd to suppose that Parliament wished, when penal servitude was ordered in the colonies, that the Secretary of State should direct the place of confinement. As to the operation of these acts in the colonies, their only effect is to authorize the sentence of penal servitude by conferring upon the Colonial Courts the jurisdiction previously exercised by an Imperial tribunal. The offence is Imperial, the legislation Imperial, and the operation of the act Imperial. Why, then should it not be affected by subsequent Imperial legislation? On the other hand, the acts which regulate the execution of the sentence do not apply to the colonies at all, and therefore the order of the Secretary of State is not required.

Upon the whole, the acts give a power to sentence and provide no mode of execution, but the sentence itself implies a right to detain the convict in prison to enforce the punishment. Throughout the acts it appears that penal servitude means compulsory detention with hard labor in places fit for the purpose. They then referred to Colonial Statute of Gaols, 1864, 27 Vict. c. 219, which empowered the Governor in Council to appoint places of confinement, and to an amending act of 1871, which authorized the appointment of an inspector-general of penal establishments. [SIR MONTAGUE E. SMITH: There is a practical distinction between penal servitude and imprisonment with hard labor. The latter is carried out within the walls of a gaol, and generally there is a limit in point of time.] A man under sentence to penal servitude is sent to gaol, and the gaoler can at least detain him till the order of Secretary of State is obtained. [SIR JAMES W. COLVILLE: I find in the Goals Act a reference to 11 Vict. No. 34, which substitutes other punishments for transportation.] Originally the Colony of Victoria was a part of New South Wales. The earliest of the Victorian laws are those which were enacted by the old legislative council of New South Wales before the Charter Act passed in 18 & 19 Vict., whereby the Colonial Legislature obtained power to make laws in all cases whatever. The laws passed by that Council, when Victoria was subject to it, would remain in force in Victoria until affected by subsequent legislation of Victoria. [SIR JAMES W. COLVILLE: Only *two sections of 11 Vict. No. 34, are repealed, viz., sects. 5 and 6.] Originally transportation was a punishment in the colony as well as in England. Then labor on the roads and on the public works was substituted

for it, and then the colony consolidated its criminal law, and by the Consolidation Act regulated all punishments.

It was the duty of the court under any circumstances to have remanded the prisoners. Admitting the imprisonment to be irregular, where prisoners under sentence are brought up on *habeas corpus*, they are not to be set at liberty for the mere irregularity of detention. The court should make such order as is consistent with law and justice. They should either have been remanded for the Secretary of State's order, being under a statutory sentence irregularly carried out, or if deemed to have been convicted at common law, they should have been remanded to whomsoever by common law has the custody of convicted criminals. Returns to the writ of *habeas corpus* are no doubt construed strictly in favor of liberty, but the presumption in favor of liberty is shifted after sentence. The presumption cannot be in favor of letting a convicted felon out of gaol. The object of the *habeas corpus* is not necessarily to let a man out of confinement, but it may be to change his confinement, as in old days from the sponging-house to the Fleet Prison, and the character of the order to be made must depend on the circumstances which appear before the court. The object of the writ is that the court is to make orders about the person. *Reg. v. Howes* (*), where an irregular detention was shown, and the order was not to set at liberty, but to return to a regular detention. [Mr. *Field*: We say the custody was illegal, not merely irregular. SIR BARNES PEACOCK: You say that the Supreme Court had no power to imprison him anywhere. Mr. *Field*: No; if sect. 6 does not apply they might have detained him till the Secretary of State had appointed the place of confinement. SIR BARNES PEACOCK: Why can they not do that on the return, assuming the return to show that the custody was illegal? Mr. *Field*: Because the return insists on the right to detain them absolutely for the fifteen years. He referred to *Re Allen* (*).] *Ex parte Lees* (*), *according to which the prisoners ought [293 not to be discharged until their sentence and judgment were reversed: *The Canadian Prisoners* (*), otherwise called the case of *Leonard Watson* (*). The Court of Queen's Bench remanded them, and then they were brought up on *habeas corpus* before the Court of Exchequer. They had been convicted of treason in Canada, pardoned on condition of transportation to Van Diemen's Land, and were brought to

(*) 3 E. & E., 332.

(*) 5 M. & W., 32.

(*) 3 E. & E., 338.

(*) 9 Ad. & E., 731.

(*) E. B. & E., 828.

Liverpool Gaol. The Court of Exchequer also remanded them. The gaoler returned that he detained them in custody in the gaol at Liverpool as a measure ancillary to their transportation to Van Diemen's Land. It appears from that case that when the court had before it circumstances justifying the prisoner's detainer in one capacity, they will not discharge him because his detainer in another capacity is irregular. With regard to *Re Allen* (¹), there is a broad distinction. It turned entirely upon the construction of certain sections in the Mutiny Act, and the validity of an order made by the Adjutant-General. It was a very doubtful question whether the authority existed anywhere to order the confinement of the prisoner in England. The keeper of the Queen's Prison could produce no order under which his detention was justified. Here, on the contrary, the prisoners were legally tried, and legally convicted and sentenced. *King v. Burrige* (²), where a man had been convicted of clergyable felony, and sentenced to transportation, and escaped from prison, and Burrige was indicted for helping him to escape. There was an elaborate argument whether the man was a lawful prisoner, and it was held that not having undergone his sentence he was lawfully confined. In *Reg. v. Brennan* (³), a case decided under 5 Geo. 4, c. 84, s. 17, it was held that the statutory provision as to appointing a place of confinement was directory only, and the neglect of it does not vitiate the detention. At common law when a felon has been convicted, and there is no warrant of commitment, the prisoner is removed under sentence of the court orally pronounced, and his detention is good. In *Allen's Case*, (¹) no jurisdiction could be exercised except under conditions which were not fulfilled, and there 294] was no legal custody discoverable. They *referred to Hale's Pleas of the Crown, p. 593; Hawkins' Pleas of the Crown, Book II., c. 19, s. 4, and Book II., c. 15, s. 40; *Cobbett's Case* (⁴); and to a General History of Transportation in vol. i. of Chitty's Criminal Law.

Mr. *Field*, Q.C., and Mr. *Bompas*, for the prisoners, submitted, first, that their detention as returned by the Inspector-General of Gaols was illegal, that is, not authorized by law; and secondly, that under those circumstances the prisoners were entitled to their discharge. The return must certify the cause *captionis et detentionis*. The return did not show that any offence had been committed against the municipal law, or of which, but for the provisions of an

(¹) 3 E. & E., 338.

(²) 3 P. Wms., 439.

(³) 10 Q. B., 492-503.

(⁴) 5 C. B., 418.

Imperial Act, the courts of the colony could take cognizance. It was an imperial offence committed on the high seas; it does not appear whether by British subjects or on a British ship. 12 & 13 Vict. c. 96, gives the power to try and adjudicate, points out the court and the procedure, and defines the pains and penalties to be suffered. It recites two earlier statutes; the first section is local and colonial with regard to the courts, the second section applies the law of England to the pain and penalty which the convict is to suffer. [SIR ROBERT P. COLLIER: The effect of the statute is to treat the offence as having been committed in the colony.] Yes; subject to this, that the punishment must be according to the law in England. The law in force as to punishment at the date of 16 & 17 Vict. was 9 Geo. 4, c. 31, s. 9. The alternative was transportation for life or a less period, or imprisonment not exceeding four years, being a marked difference as to the term.

Transportation was unknown at common law except by way of conditional pardon: Chitty's Crim. Law, vol. i., pp. 789, 790, 791-6. The Habeas Corpus Act, 31 Car. 2, c. 2, s. 14, allowed it by way of substitution for death. By 4 Geo. 1, c. 11, s. 1, persons convicted of certain specified offences were to be sentenced to transportation and sent as soon as conveniently could be. 8 Geo. 3, c. 15; 31 Geo. 3, c. 46, s. 7, by which offenders sentenced to transportation may be ordered by the court to be imprisoned and kept to hard labor in the common gaol for the county as therein mentioned, even during the whole term of their sentence. That *statute was repealed by 5 Geo. 4, c. 84, s. 29. Under [295 that act (sect. 3), His Majesty, with the advice of the Privy Council, was to select the place of confinement. [SIR JAMES W. COLVILLE: Do you know how transportation was conducted in the colony? Mr. Stephen: The practice was to transport from Victoria to Van Diemen's Land and Tasmania, under the power of intercolonial transportation, which is recognized in 5 Geo. 4, c. 84, s. 17.] Throughout the acts great jealousy is shown in restricting the place of custody to such places as the Crown or Secretary of State should point out. It is not unreasonable that the Penal Servitude Act should exhibit the same jealousy. [SIR MONTAGUE E. SMITH: That does not apply to the selection of a gaol within the colony itself.] As to 9 Geo. 4, c. 31, there is nothing bearing on the present subject. Then came the change in the law which took place when penal servitude was substituted for transportation, 16 & 17 Vict. c. 99, s. 6. Penal

servitude and transportation are substantially the same thing by different names.

Sect. 6 of the latter act only legalizes one mode of detention, and no other. The direction of the Secretary of State is the only means of defining the place of confinement. [SIR ROBERT P. COLLIER referred to 5 Geo. 4, c. 84, s. 18, as at least authorizing detention for a time.] Under sect. 6 the detention was illegal, because the Secretary of State had not appointed a place of custody. Neither was the detention legalized under the Colonial acts. See the Colonial Gaols Act of 1864, which was a Consolidation act of the law relating to gaols, and in the schedule is contained the various statutes which that act repealed. 11 Vict. No. 34, is one of those acts of which sects. 5 and 6 are repealed. That act substitutes other punishment for transportation. They referred to Consolidation of Criminal Law, No. 233, sect. 291, and 37 & 38 Vict. c. 27, which was passed in consequence of this case.

The next question is, assuming that the prisoners were not lawfully in custody, are they entitled to be discharged? That depends on the law of *habeas corpus*. See Bacon's Abridgement, tit. Habeas Corpus, Letter A. The return may be amended at any moment up to filing it. Originally it may have been bad, but up to filing it the person detain-296] ing may amend and state the true cause of detention. See also, under same title, Letter B. *Habeas Corpus ad subjiciendum*. They referred to Coke's Institutes (2d part) on "*Nullus Liber Homo*," &c. of *Magna Charta*, p. 55, and to the statute of Charles II.; also to *Rex v. Deybel* ⁽¹⁾; *Rex v. Nash* ⁽²⁾; *Rex v. Souden* ⁽³⁾; *Leonard Watson's Case* ⁽⁴⁾; *Re Allen* ⁽⁵⁾. The precise cause of detention must be stated in the return. They referred also to *Ex parte Krams* ⁽⁶⁾. The gaoler must state in the return the particular ground on which he relies. The question is whether that return, construed strictly in favor of liberty, discloses a right to detain. In this case he returned that he was holding the prisoners in a form of imprisonment which was illegal if for more than four years, while he also returned that he was detaining them "for the cause and to the end" that they might undergo a sentence of fifteen years' penal servitude.

Mr. Fitzjames Stephen, Q.C., in reply, accepted the respondent's construction of the statutes from 4 Geo. 1 to 16 & 17 Vict., viz., that all through the acts relating to trans-

⁽¹⁾ 4 B. & A., 243.

⁽²⁾ Ibid., 295.

⁽³⁾ Ibid., 294.

⁽⁴⁾ 9 Ad. & E., 731; 5 M. & W., 32.

⁽⁵⁾ 3 E. & E., 338.

⁽⁶⁾ 1 B. & C., 258.

portation the provisions were such that the courts regarded with great jealousy the execution of the punishment of transportation, and the Crown alone was to have the right to point out the place to which transportation should be effected. But, he repeated, that the whole of the English acts, with one or two exceptions, were applicable to sentences passed in Great Britain for offences liable to be tried in Great Britain. Throughout there was no provision which bore upon the execution of that part of the sentence which was to be executed in the colony. Nor, with two or three exceptions, do they refer to punishments inflicted in the colony after sentence passed in the colony. Each act, down to 20 & 21 Vict., applies entirely to England, and the task of executing sentence in the colony is left to be determined by colonial legislation.

As to the history of colonial transportation, the first reference to it is in sect. 17 of 5 Geo. 4, c. 84; see also sect. 3; and 6 Geo. 4, c. 69, s. 4. Then as to the public statutes of New South Wales. Down to the Charter Act, Victoria, under the name of Port Philip, *formed part of [297 New South Wales, and Victoria is still governed by laws of New South Wales passed before the Charter Act. See 7 Geo. 4, No. 5, which recites the said 6 Geo. 4, c. 69, an Order in Council of the 11th of November, 1825, made under that act, and a proclamation in (1826) of the Governor of New South Wales, appointing certain penal settlements. That power was first delegated to the Governor by 6 Geo. 4, c. 69. Then see 11 Geo. 4, No. 12, and 3 Will. 4, No. 3, which repealed and consolidated the former acts. Then we come to 11 Vict. No. 34, 13 & 14 Vict. No. 49; then the Consolidation of Crim. Law, 27 Vict. No. 233. Just as in England penal servitude was substituted for transportation, so hard labor in public works was substituted for transportation in Victoria, and consequently such hard labor must be regulated by the colonial statutes. Hence the proper way of executing this sentence was under the Gaols Act, 1864, and 16 & 17 Vict. c. 99, s. 6, does not apply.

As to *habeas corpus*, Coke's Institutes and Bacon's Abridgement are not exhaustive. A convicted felon is not to escape because the return of his gaoler is not justified on the particular ground alleged, though it may be justifiable otherwise. It is only to be construed in favor of liberty when a *prima facie* title to liberty is made out. Here it is admitted that the Inspector-General had a right to detain if he had returned to the effect that he was detaining till the Government had invoked the interference of the Secretary

of State in the affairs of the colony. At all events, the gaoler had a right to detain, and the court should have decided whether he should do so till the sentence had been fully executed, or till the Secretary of State had given directions. Hale's Pleas of the Crown, p. 410, on Execution, c. 57, No. 4. [SIR MONTAGUE E. SMITH: As in a criminal case we cannot take an admission, how do you establish that the sentence is a legal one?] It is passed under 16 & 17 Vict. and 20 & 21 Vict. of the Imperial Legislature. The local extent of those acts must be determined by considering the nature of their provisions. [SIR BARNES PEACOCK: Suppose 16 & 17 Vict. does not apply to the colonies, and that the court ought to have passed a sentence of hard labor on the roads, can we review their judgment on a writ of *habeas corpus*? In ap-298] peal we could rectify the judgment, and a court, *e. g., the Common Pleas, may have no criminal jurisdiction, while it has in writs of *habeas corpus*.] The prisoners can only take advantage of error in the sentence by appeal, or on writ of error. [Mr. Bompas referred to *Ex parte Dunn* (¹) to explain the abandonment of that point, and to *Re Crawford* (²).] *Ex parte Lees* (³) is to the same effect.

March 16, 1875. The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH: The respondents (Mount and Morris) were tried at the sessions of the Supreme Criminal Court of the Colony of Victoria, upon a criminal information for murder committed on board a British ship on the high seas, and were convicted of manslaughter.

The Chief Justice, who tried them, entertaining doubts as to the nature of the sentence which, by law, might be passed, consulted the other judges of the Supreme Court, who were of opinion that a sentence of penal servitude might be awarded; and, accordingly, at a subsequent sessions, the respondents were sentenced to penal servitude for fifteen years.

In pursuance of this sentence the respondents were first confined in a gaol at Melbourne, being a public gaol within the meaning of the colonial act, the Statute of Gaols, 1864, and were afterwards, under a warrant of the Inspector-General of Penal Establishments, removed to another gaol at Pentridge, being also a public gaol within the meaning of the above act, there to be detained until the expiration of their sentence, or until discharged or removed by lawful authority.

The respondents, complaining that their detention in Pent-

(¹) 17 L. J. (C. P.), 97.

(²) E. B. & E., 828.

(³) 18 L. J. (Q.B.), 275.

ridge Gaol was illegal, obtained a writ of *habeas corpus* from the Supreme Court of Victoria, to which the Inspector-General made the following return: [His Lordship read it (').]

After hearing arguments upon this return, the court made an order that the prisoners be "discharged from their imprisonment and set at large," mainly, as appears from their judgment, on the ground that a sentence of penal servitude cannot be carried out in any gaol in the colony with- [299 out the preliminary direction of one of Her Majesty's Secretaries of State. The judgment on this point concludes as follows:

"The punishment of transportation could not have been enforced unless the King in Council appointed the places to which offenders were to be transported, nor unless the Secretary of State specified which of the places so appointed each particular offender was to be sent to (5 Geo. 4, c. 84, s. 3). A sentence of penal servitude, whether passed in the United Kingdom or in a colony, requires the same preliminary act of a Secretary of State (16 & 17 Vict. c. 99, s. 6). Without it the sentence cannot be put into execution. In cases of penal servitude it ascertains the place where the hard labor is to be performed, just as in ordinary cases the sentence of the court ascertains the gaol in which imprisonment is to be undergone; and although the discipline to which the prisoners are subjected may be, as was urged by the Attorney-General, the same as if the Secretary of State's direction had been obtained, the imprisonment which the prisoners are now undergoing is not in accordance with the sentence passed upon them, nor is it in any way subservient or auxiliary to its execution."

The present appeal is from the order discharging the respondents.

It was not disputed by their counsel at their Lordships' bar that the sentence of penal servitude was correct, and their argument was limited to alleged errors in the manner of its execution.

Before, however, dealing with these objections, it will be convenient shortly to consider the statutory law on which the sentence itself is founded.

The jurisdiction to try persons charged with offences committed on the sea within the jurisdiction of the Admiralty, was, for the first time, conferred on colonial criminal courts in 1849, by the Imperial act (12 & 13 Vict. c. 96). For this purpose it was enacted (sect. 1) that these courts should

(') See *ante*, p. 285.

have the same jurisdiction for trying such offences, and be empowered to take and exercise all such proceedings for bringing persons charged therewith to trial, and "for and auxiliary to and consequent upon the trial," as by the law 300] of the colony might have been taken if the *offence had been committed upon any waters within the limits of the colony.

The second section, which relates to the sentence to be passed in such cases, provides that convicted persons shall be subject to the same punishment as "by any law now in force" persons convicted of the same offence would be liable to in case such offence had been committed, and was "inquired of, tried, and adjudged in England."

The words "now in force" occasioned the doubts entertained by the Chief Justice as to the nature of the sentence to be passed.

At the time this act passed the punishment for manslaughter in England (under the 9 Geo. 4, c. 31, s. 9) was transportation for life, or for a term not less than seven years, or imprisonment, with or without hard labor, not exceeding four years, or fine.

In consequence of the difficulty of finding suitable places to which offenders might be transported, penal servitude was substituted in some cases for this punishment by the 16 & 17 Vict. c. 99. This act was soon followed by the 20 & 21 Vict. c. 3, which enacted that no person should be sentenced to transportation, and that persons who, if the act had not passed, might have been sentenced to transportation, should be liable to be sentenced "to be kept in penal servitude."

It could not be disputed that penal servitude would have been a proper sentence if the respondents had been tried in England, and the doubt thrown upon the validity of such a sentence in the colony arises upon the question whether the words "now in force" in the 12 & 13 Vict. c. 96, allow of the application in the colonies of the punishment substituted in England for that in force when the act passed.

On this question their Lordships think that, although the Imperial act abolishing transportation does not in terms include the colonies, it is applicable to them with respect to the sentences to be passed on persons convicted in the colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the Imperial act on colonial courts. Such offences might be tried, after that act, either in England or the colonies, and the Legislature clearly expressed its intention that the punishment should be the same,

wherever the trial might take place. This *general [301 intent and policy should, therefore, govern the construction of the acts, unless it plainly appears from the language of the later statute that the Legislature meant to change it.

The words "now in force," in the original act, no doubt apply in terms to the existing law. But the latter part of the section, directing that the punishment should be the same as it would have been if the offence "were inquired of, tried, and adjudged in England," show with distinctness that the Imperial Legislature was conferring power upon the colonies to try offences properly cognizable in England, with the consequences which would have attended a trial there. The punishment was accordingly directed to be the same as it would have been by the existing law if the offence had been tried in England.

When the Imperial Legislature altered that law, and substituted penal servitude for transportation, it is reasonable to suppose that the alteration was intended to embrace sentences for offences tried in the colonies under the special jurisdiction conferred by the 12 & 13 Vict., since there is no trace of any intention on the part of the Legislature to change the policy of that act, which orders these sentences to be passed according to the law of England.

This construction creates no conflict between Imperial and colonial authority, and in no way affects the rights and privileges of the colonial legislatures. It simply affirms that the Imperial statute which gave the courts of the colonies, *quoad* offences committed upon the seas beyond their territorial limits, a jurisdiction which their own Legislatures could not confer, was altered by a subsequent Imperial act.

Their Lordships therefore see no reason for disagreeing with the judges who advised the Chief Justice that a sentence of penal servitude might be passed upon the respondents.

The only question argued at the bar, on behalf of the respondents, related to the manner of executing this sentence in the colony, and must now be considered.

At the passing of the act conferring Admiralty jurisdiction on the colonies (12 & 13 Vict.), the punishment for manslaughter, according to English law, was, as already stated, transportation, or imprisonment with hard labor for four years.

The 17th section of the Imperial act (5 Geo. 4, c. 84), which *consolidates the earlier acts relating to trans- [302 portation, recognized the power, then existing in some colonies, to transport offenders; and by the 4th section of the

Imperial act, passed in the following year (6 Geo. 4, c. 69), the King was empowered, by an order in Council, to authorize governors of colonies to appoint places to which offenders sentenced in the colonies to transportation should be sent.

The colonial acts of New South Wales, which then included Victoria (afterwards made applicable to the new colony by the 14 Vict. No. 49), show that an order in Council was issued by the King under the last-mentioned statute, and that provision was made by the Colonial Legislature for carrying sentences of transportation into execution: see 7 Geo. 4, No. 5; 11 Geo. 4, No. 12; 3 Will. 4, No. 3.

But the same difficulty of carrying into execution sentences of transportation was experienced in the colonies as existed in England, and accordingly by the New South Wales Act (11 Vict. c. 34), it was enacted, whilst continuing the sentence of transportation, that in lieu thereof offenders might be sentenced to be kept to hard labor on roads or public works.

Such was the state of the colonial law relating to transportation when the Admiralty jurisdiction to try offenders was conferred on colonial courts (12 & 13 Vict.), and there would seem to be no sufficient reason for saying, if a sentence of transportation had then been awarded in the colony, that its execution should have been transferred to the English authorities. The direction in the act that the punishment should be the same as if the trial had been in England is satisfied by holding that the nature of the sentence must be the same. It could hardly have been intended, if the sentence were imprisonment, that the offender should be sent to England to be confined in an English gaol; or that the provisions relating to transportation from England, which include power to imprison in English gaols (see 5 Geo. 4, c. 84, ss. 18, 19), should be put in force.

When the law of England abolished transportation, and substituted for it penal servitude, the latter, as already stated, became a sentence which might be lawfully passed by the colonial courts when acting under their Admiralty criminal jurisdiction.

303] *The argument for the respondents came to this: that there being no such punishment as "penal servitude," *eo nomine*, in Victoria, such a sentence could be carried into execution only in accordance with the disciplinary regulations of the English statutes, and if those regulations were not applicable, that it could not be carried into effect at all.

It was said that the 6th clause of the Imperial act (16 &

17 Vict.), which for the first time introduced penal servitude as a substitute for transportation, was applicable to colonial sentences. This section enacts that persons sentenced to penal servitude may be confined in such prison or place in the United Kingdom or in Her Majesty's dominions beyond seas, as a Secretary of State may direct. The Supreme Court yielded to this contention, and held that without a preliminary order of a Secretary of State appointing the prison or place where the labor was to be performed, the sentence could not be put into execution.

The question is not free from difficulty; but their Lordships, on the whole, think that the directions in the 6th clause form no part of the sentence. They are not contained in the section of the act defining the nature of the sentence, nor are they embodied in it when judicially pronounced. It appears to them that these provisions relate only to the manner of its execution and to matters of administration, and therefore need not be resorted to in the case of sentences passed in the colonies, which, in their view, may be carried into effect in accordance with the procedure provided by them.

It is then said that no legislative provision has been made in the colony for executing this sentence. Supposing this were so, and that a sentence of penal servitude had been absolutely new in the colony, it could by no means follow after the Imperial Legislature had directed such a sentence to be awarded, that, when passed, it might be treated as null, because no means had previously been provided there for carrying it into effect.

But, on behalf of the Attorney-General, it is urged that means do exist in the colony for executing an analogous sentence, which are adapted to executing that of penal servitude.

The Imperial act, which substitutes penal servitude for transportation, defines or describes the sentence only by the following terms: that the offender "be kept in penal [304 servitude;" "kept," of course, implies detention, and "penal servitude" compulsory labor. This, then, is the nature of the sentence.

The Colonial act (11 Vict. c. 34), provides that in lieu of transportation offenders may be sentenced to be kept to hard labor on roads or public works; and now, by the Criminal Law Consolidation Act (27 Vict. No. 233), transportation is virtually abolished in the colony, and detention and keeping to hard labor on public works at places to be appointed for that purpose is substituted for it (sect. 291).

By the Statute of Gaols, 1864, the Governor in Council may appoint places in Victoria at which offenders under such a sentence of detention shall be detained and kept to hard labor (sect. 4), and it is directed that all gaols and hulks shall be under the charge and direction of the sheriff, or such other officer as the Governor may appoint (sect. 8). By a later act (the Statute of Gaols Amendment Act, 1871), the 8th section of the former act is repealed, and the Governor in Council is empowered to appoint an Inspector-General of Penal Establishments, who was to have the charge and direction of all gaols and hulks, with power to remove prisoners under sentence from one gaol to another. This statutory officer was invested with the powers which before belonged to the sheriff.

Moreover, by a recent Imperial statute, the Colonial Prisoners Removal Act, 1869, which in effect authorizes inter-colonial transportation, it is enacted that prisoners, "under sentence of transportation, imprisonment, or penal servitude," may be removed under certain conditions and regulations, and by agreement between any two colonies, from one colony to the other, for the purpose of undergoing their sentence in the other colony. This statute recognizes "penal servitude" as a punishment existing in, at least, some colonies, and places it in the same category with "transportation and imprisonment."

In the result, it appears to their Lordships, upon a review of the above-mentioned acts of the Imperial and Colonial Legislatures, that sentences of penal servitude, in other words, of detention and compulsory service, may be carried into execution in the colony; and, therefore, that the return [305] of the Inspector-General *that he detained the respondents by virtue of the sentence passed upon their conviction "for the cause and to the end that they may undergo such sentence," is sufficient.

But if this were not so, and if the judges of the Supreme Court were right in holding that an order of the Secretary of State was necessary, their Lordships think they erred in setting the prisoners at large. In any event, some time must have elapsed after the sentence had been passed before such an order could be obtained, during which the prisoners must have been necessarily detained by the Inspector-General, as the statutory sheriff; and in any view of the case, the court should, in their opinion, have remanded the prisoners to his custody, to give the opportunity for an application to the Secretary of State for the order the court thought necessary. The prisoners who had been convicted of felony, ought not

to have been set at large during the term of their sentence, until it was clear that no lawful means of executing it could be found: *Ex parte Krans* ⁽¹⁾; *Parker's Case* ⁽²⁾.

The case of *Rex v. Allen* ⁽³⁾ was exceptional in its circumstances; the prisoner had been tried by a court martial in India, and when he had been brought to England under an invalid warrant, there seemed to be no lawful way of carrying the sentence into effect.

For these reasons their Lordships will humbly advise Her Majesty to reverse the order under appeal.

Attorneys for the appellant: Messrs. *Freshfields & Williams*.

Attorneys for the respondents: Messrs. *Stoneham & Legge*.

⁽¹⁾ 1 B. & C., 258.

⁽²⁾ 5 M. & W., 32.

⁽³⁾ 3 E. & E., 338.

[Law Reports, 6 Privy Council Cases, 319.]

J.C.⁽¹⁾, March 17, 18, 1876.

***THE COBEQUID MARINE INSURANCE COMPANY, Defendants; and BARTEAUX, Plaintiff. [319]**

ON APPEAL FROM THE SUPREME COURT OF HALIFAX, NOVA SCOTIA.

Marine Insurance—Power of the Master to sell—Total Loss.

The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity; such circumstances as, after sufficient examination of her condition, after every exertion in his power, within the means at his disposal, to extricate her from peril or to raise funds for the repair, leave him no alternative but to sell her as she is.

Rule made absolute (reversing the order of the Supreme Court) for a new trial, on the ground that the verdict in favor of the insured was against the weight of the evidence as to the necessity for sale.

THE action in which this appeal arose was brought by the respondent to recover \$4,000 and interest upon a policy of insurance effected with the appellants in the sum of \$4,000 upon the brigantine Foyle, valued at \$8,000, for 12 months, that is to say, from the 23d of June, 1868, at noon, until the 23d day of June, 1869.

The writ and declaration were issued on the 10th of August, 1870, and contained two counts on the policy for a total loss, and a common money count for interest.

Pleas: Firstly, a denial of the making of the policy;

⁽¹⁾ *Present*: SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR HENRY S. KEATING.

1875

Cobequid Marine Insurance Co. v. Barteaux.

J.C.

secondly, that no proof of the alleged loss and the respondent's interest in the vessel was ever given to the appellants, as required by the policy; thirdly, that the vessel was not lost by the perils insured against, or any or either of them; fourthly, that the respondent was not interested in the vessel to the amount of all the insurance thereon as alleged; fifthly, that the alleged loss was caused by the fraud and negligence of the respondent and his servants, and not by the perils of the sea as alleged; and, sixthly, that the appellants were not indebted as alleged.

320] *The cause was on trial before the Chief Justice of the Supreme Court of Halifax and a jury, on the 11th of October, 1871. At the trial the appellants admitted the making of the policy, that preliminary proof was given to the appellants as required by the policy, and also that the respondent was interested in the vessel.

The effect of the evidence adduced is stated in the judgment of their Lordships given below.

The Chief Justice directed the jury as follows: " The want of a notice of abandonment could only be excused by the necessity of the sale, if that necessity existed. This was a point of a good deal of nicety, which I would reserve, if the defendant's counsel desired it, for the consideration of the court. The main question was the alleged necessity for the sale, and the jury must look with a sharp and jealous eye at a transaction marked by many unusual and suspicious circumstances. There was no evidence of a fraudulent stranding. A resident would have avoided the shoal, but it was not on the chart, and it was unknown to the master. Being competent to command the ship, his ignorance or want of caution in this matter afforded no defence to the underwriters. But being on shore, had he exerted himself with rules sufficient promptitude and energy? I here cited the law as laid down in *Arnold*, and in our own decisions, and put it to the jury whether the master ought to have been content with the discharge of only ten tons of coal on the 16th, and should not have called in on that and the succeeding day a body of the miners or other men in the neighborhood, and attempted, by their aid, what the purchasers actually effected. The jury should consider, too, whether the holding of the sale on a day sooner than was at first intended was a *bona fide* and honest act, or was the result of any contrivance or collusion.

"The survey also had been hurriedly and incautiously drawn; all these facts, on which I forbore to give any opinion, were to be taken into account. There was no proof of

the vessel having been overvalued or over-insured, and the master disclaimed any interest in the purchase. Still, if he had precipitated the sale from want of firmness or of judgment, this was one of the cases where the owners must suffer from it. He could sell his own quarter, *but not the [321] other three quarters, so as to bind the insurers, unless an extreme overmastering necessity, a moral necessity, for the sale had been shown to the satisfaction of the jury."

The jury found a verdict for the respondent for \$3,526, being \$4,000, the amount of the policy of insurance less \$474, being one half of the net proceeds of the sale.

On the 14th of October, 1871, the appellant company obtained a rule *nisi* for a new trial on the grounds of misdirection, that the verdict was against law and evidence, and for the improper rejection of evidence. On the argument of the rule, on the 8th of February, 1873, the Supreme Court (Young, C.J., Ritchie, Des Barres, J.J., Wilkins, J., dissenting), gave judgment discharging the same.

Mr. *Watkin Williams*, Q.C., and Mr. *Wood Hill*, for the appellant company: This is not a case of constructive total loss at all; even if it were, the sale is not justifiable, in the absence of notice of abandonment. There was no evidence of a total loss. It was not clearly put to the jury whether the master could by means within his reach, and which he could reasonably use, have extricated his vessel, and they were led to suppose that even if he sold without first exhausting those means, the sale might still be justified by necessity. It is a fallacious test to propose, whether the sale was beneficial for all concerned. The jury ought to have been directed that the true question was whether the vessel under the circumstances was in such a condition, taking all things together, that it was not worth while to pursue her any further, or to make any further attempt to save her, with a view to recovering her and restoring her as a sea-going ship, or that the assured would have been justified in abandoning her and giving up all further intention of extricating her from her position.

Mr. *Cohen*, Q.C., and Mr. *Grantham*, for the respondent: If a vessel is placed by the perils of the sea in such a position that the master has implied authority to sell her so as to convey a good title to the purchaser, and acts *bona fide*, the insurers are bound. This is a case of absolute, not constructive total loss. The *necessity for sale depends on the [322] evidence of the circumstances existing at the time of the sale, not of what happens after the event. They cited *The Kar-*

1875

Cobequid Marine Insurance Co. v. Barteaux.

J.C.

nak ('); *Australasian Steam Navigation Co. v. Morse* ('); *Anderson v. Morice* ('); *Ionides v. Universal Marine Association* ('); *Dent v. Smith* (').

A new trial should not be granted unless the verdict is clearly perverse. The sale being necessary and in the interest of all parties, passed the property in the ship, and a total loss to the insured resulted: *Farnworth v. Hyde* ('); *Barker v. Janson* ('). They referred also to Phillips' Law of Insurance, vol. ii., p. 248, 249, as to the power of the master, sec. 1524, and as to the effect of the surveyor's report, sec. 1589; *Dixon v. Sadler* ('); Parsons on Shipping, vol. i., p. 68, sect. 4, ch. 3, and the case of the brig *Sarah Ann* ('), referred to in the note; also cases therein referred to: *Ship Fortitude* ('); *Hayman v. Moulton* ('); *Gordon v. Mass. Fire and Marine Insurance Company* ('); Arnold on Insurance [2d ed.], p. 1104; and *The Australia* (').

Mr. Watkin Williams, Q.C., in reply, referred to the *African Merchants Company v. Harper* recently before the Exchequer Chamber ('); *Reimer v. Ringrove* ('); *Navone v. Haddon* (') Parsons on Marine Insurance, vol. ii. [ed. 1868], pp. 145, 147.

The judgment of their Lordships was delivered by

SIR HENRY S. KEATING: This was an action brought in Nova Scotia upon a policy of insurance effected with the present appellants in favor of the respondent. It was a time policy for twelve months upon a vessel called the Foyle, which was a comparatively new vessel, being only three years old, and 323] carrying somewhere about 400 tons. *The plaintiffs in the action below sought to make the insurers liable upon the ground of a total loss, and the total loss relied upon was the sale of the vessel under circumstances which, it was said, justified that sale, and so occasioned to the owners a total loss of the ship.

The cause was tried before the Chief Justice of the Supreme Court of Halifax, and he directed the jury that in order to justify the sale it was necessary that an urgent necessity for such sale should be shown; and he left the question, accompanied by some strong remarks on the facts, as

(1) Law Rep., 2 P. C., 506.

(2) Law Rep., 4 P. C., 222.

(3) Law Rep., 10 C. P., 58-70.

(4) 22 L. J. (C.P.), 174.

(5) Law Rep., 4 Q. B., 414.

(6) 34 L. J. (C.P.), 207, 210.

(7) Law Rep., 3 C. P., 303.

(8) 5 M. & W., 414.

(9) 2 Sumner, 206, 215: affirmed on appeal, 13 Pet. 287.

(10) 3 Sumner, 228.

(11) 5 Esp., 65.

(12) 2 Pickering, 262.

(13) 13 Moo. P. C., 132.

(14) Unreported.

(15) 6 Ex., 263.

(16) 9 C. B., 30.

to whether that necessity existed. A verdict was found for the plaintiff. Their Lordships do not think it necessary to inquire into the way in which the verdict was afterwards settled upon the figures, because the verdict was only questioned in the Supreme Court upon the ground, first, that the Chief Justice had misdirected the jury, and next, that the verdict as found for the plaintiff was against the weight of the evidence in the case. The whole court were of opinion that there was no ground for imputing misdirection in the charge of the Chief Justice to the jury, and in that opinion their Lordships concur. But the majority of the court were of opinion that the verdict of the jury was so far justified by the evidence that they refused to grant a new trial upon the ground that the verdict was against the weight of the evidence, and discharged a rule obtained for such new trial. One member of the court took an opposite view, and the appeal comes up here as to how far the majority of the court was right in refusing a new trial upon the ground that the verdict was against the weight of the evidence in the case.

With reference to the law upon the subject, there seems now to be no doubt whatever; and it cannot be questioned that the master, under circumstances of stringent necessity, may effect a sale of the vessel so as thereby to affect the insurers. That he can only do so in cases of such stringent necessity has been laid down in a great variety of cases unnecessary more particularly to be referred to, as they are well summarized in the work of Mr. Parsons at p. 147, where he also takes the distinction between the rule that a sale is justified by stringent necessity only, and what was sometimes supposed to be a rule, that the sale would be *jus- [324] tified if made under circumstances that a prudent owner uninsured would have made it. He distinguishes between the two, and establishes upon satisfactory authority that whilst what a prudent owner would have done under the circumstances if uninsured may illustrate the question as to how far there was a stringent necessity for selling, yet that the rule is that there must be a stringent necessity. In *Arnold on Insurance* the circumstances that will justify the master in selling seem to be well and clearly put, and to be quite borne out by the authorities that are cited in support. Mr. Arnold says:

“The exercise, however, of this power”—that is, the power of the master to sell—“is most jealously watched by the English courts, and rigorously confined to cases of extreme necessity. Such a necessity, that is, as leaves the

master no alternative, as a prudent and skilful man acting *bona fide* for the best interests of all concerned, and with the best and soundest judgment that can be formed under the circumstances, except to sell the ship as she lies; if he come to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, or to raise funds for the repair, he will not be justified in selling, even although the danger at the time appear exceedingly imminent."

That seems to be the true rule to apply in these cases where it is most important to confine within strict limits the powers of a master to sell the ship.

Now, applying that rule to the circumstances of the present case, their Lordships come to the conclusion that this case ought to undergo a further inquiry.

It seems that this vessel, the Foyle, being at a place called Lingan, in Nova Scotia, shipped a cargo of coals to the amount of 420 tons; but that quantity being too great to admit of her passing over the bar of the port, she was lightened, and having passed the bar, again reshipped the coals which had been taken out of her. On the 16th of June, 1869, at 11 A.M., she weighed her anchor, and in about thirty minutes afterwards ran upon a reef or ledge off the southern head of Lingan Bay, at a distance of about 300 yards from 325] the shore, about three miles from Lingan, and *about a mile from a place called Bridgport. It is material to consider the neighborhood of that place, because that was a place from which it appears clearly on the evidence assistance could have been obtained. Having run upon this reef, the captain at first signalled for the tug-boat at Lingan; the tug came out and attempted to haul the vessel from the reef, but the hawser parted. Having repaired that hawser, it parted a second time. The hawser having parted a second time, the master of the tug, who was called as a witness, seems to have given very good advice, namely, that the ship should be lightened in order that further efforts should be made. The captain of the Foyle appears to have acted upon that advice to a certain extent, for about 10 tons were taken out of the vessel by the crew, and they worked at it up to about 9 o'clock that night. Whether that was a sufficient quantity or an insufficient quantity does not become, perhaps, in the result, very material. That was the only quantity that was got out up to that period. The master afterwards became anxious, because he was told that if the

wind shifted to the north he would be in great peril. At 5 A.M. on the 17th, he went on shore, and between 10 and 11 A.M. brought off three persons to make a survey of the vessel, and what is called a survey was thereupon made. The surveyors agreed that the vessel should be condemned, and at first were of opinion that the sale might be delayed until the 18th, but they seemed suddenly to have changed that opinion and to have thought that the sale ought to take place on the 17th, and with a view to that sale they drew up the form of their survey. They stated, that having

“Carefully and particularly inspected, examined, and surveyed the said vessel, we find that the said vessel lies stranded off the head of Lingan Bay, exposed to the storms of the Atlantic, making water, lying on a reef, and in a very dangerous position, considerably hogged on the port side, badly strained, rolling heavily on her bilge. We also find that the said vessel lies in such a dangerous position that should the wind happen to change and blow from the north-east, south-east or east, she would probably go to pieces immediately;”

and they recommend a sale to take place the same day.

*Now, in deciding the question how far the verdict [326 was or was not against the weight of the evidence, Mr. Cohen would seem to be justified in saying that the case as made upon the part of the plaintiff should alone be looked at, as he was entitled to assume that the jury might possibly have believed the case on the part of the plaintiff and utterly disbelieved all the witnesses on the part of the defendant, even though no proof is furnished that would justify a conclusion that such was the case. But even looking only to the case of the plaintiff, and the evidence given upon his part, it appears to their Lordships that this report of the surveyors was manifestly incorrect, and indeed wholly unfounded. There is no evidence that the ship was “making water;” or that she was “considerably hogged on the port side,” or hogged at all; or that she was “badly strained,” indeed the reverse was the case; and it is of great importance to observe that these statements as to the vessel were statements of facts which ought to have been apparent to the eye of the master himself how far they were correct or the reverse, as he states that he was present when the vessel was surveyed by the surveyors, and he says, “I saw no pumping, I did not know that she had suffered any injury.” In that he was quite right, because in fact the vessel had not suffered any injury, and there was no necessity for pumping because the ship had made no water.

Now, in judging of the question how far the sale was justified by stringent necessity, of course the state of the vessel—that is, not the reported state, but the true state of the vessel, becomes an important element for consideration. Here the vessel was in fact uninjured, as the master must or ought to have known, and yet with the exception of taking a very small quantity of her cargo out and hauling upon the kedge which he could not have supposed would be of any effect, he seems to have done nothing between the 16th and the sale, although it does not appear that all the means subsequently used by the purchasers, which floated her within a few hours, might not have been equally made available by himself for the same purpose had he endeavored to obtain them. As to the state of the weather, there is a conflict of evidence as between a calm and a breeze, but there is no 327] evidence of anything *like rough weather, and whilst the sale was going on, any wind that existed is admitted to have gone down.

The sale took place. It is not necessary to go into the particulars of the sale. The ship was sold of course very much below her value, and purchased by one of the surveyors, for his two nephews, who quickly took the means neglected by the master and floated her substantially uninjured in a few hours.

The judges who formed the majority of the court upon this occasion, professed themselves unable to understand or to collect from the evidence why further efforts had not been made.

“In the light of these facts I confess,” says the learned judge who delivers the judgment, which must be taken to be the judgment of the whole of the majority of the court, “I cannot quite understand the conduct of the master, nor why he did not pursue the course subsequently adopted by the purchasers after his first attempt had failed. The lightening of the vessel by the discharge of her cargo would seem the obvious course to be pursued, and this, on consultation with the master of the tug, was determined upon. He did indeed employ his crew for a time in doing this; but if he really considered his vessel in jeopardy, and Hall, the master of the tug, had told him to get the coals out of her, for if the wind came from the north he would lose her, ought he not to have sought assistance from the shore, which he could have obtained as easily as the purchasers did? If I were asked whether in my opinion the master had done what was required of him I should be slow in arriving at the conclusion that he had resorted to all the

measures within his reach, and had exerted himself with sufficient promptitude and energy so as to justify the sale of the vessel.”

But the learned judge added that it was a practical matter for the consideration of the jury.

Now their Lordships entirely agree with the learned judge in their inability to discover on the evidence for the plaintiff himself why those efforts were not made; and inasmuch as to justify the sale those efforts ought to have been made, there seems to be strong reason for ascertaining how far another jury would agree in the very sound and sensible opinions expressed by the majority of *the court themselves, [328 or whether they would coincide in the view taken by the former jury.

Of course their Lordships would be slow to advise a new trial where there was a substantial conflict of evidence. In the present case the record does not disclose the fact whether the Chief Justice expressed himself dissatisfied with the verdict. It does not state the fact either way, that he expressed himself to be satisfied or dissatisfied. That he was not perfectly satisfied with the verdict, their Lordships can perhaps collect from the passage just read, and which must be taken to be the expression of the opinion of the Chief Justice himself. * But in an ordinary case, although the non-expression of the dissatisfaction upon the part of the judge is generally looked upon as forming a serious obstacle to ordering a new trial, yet at the same time, if it is plain that the evidence was such that there is ground for the belief that the jury really did act without giving that weight which they ought to do to the evidence that was laid before them, there is no reason whatever why a new trial in the interests of justice should not be directed.

In this case it would be too much to say that there was no evidence of the stringent necessity that would have justified a sale. Had there been no evidence there would have been a misdirection; but their Lordships are of opinion, having regard to the evidence given of the absence of those efforts upon the part of the master, which efforts would alone justify a valid sale—that is, a sale which should be valid as against the insurers—that the verdict of the jury as given was undoubtedly against the weight of the evidence. The learned judge who dissented, Mr. Justice Wilkins, states—

“That he gathered from the opinion expressed by a majority of the court, that had the respective judges who composed it been on the jury that tried the cause, they would not have found as the jury found. I should certainly, had

I been in the jury box, not have concurred in such a finding. My opinion is, moreover, that wherever such a sentiment pervades the bench in relation to such a case as this, the result of investigation and deliberation that induces it ought to constitute a sufficient ground for setting the verdict aside."

329] *It is not necessary to pronounce an opinion as to how far that does or does not lay down the rule too broadly. It is sufficient to say that the verdict is against the weight of the evidence. The rule which is correctly laid down in *Arnold* seems to fit this case so completely as to render a new trial inevitable upon this evidence:

"If the master come to the conclusion to sell hastily, either without sufficient examination into the state of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, he will not be justified in selling even though the danger at the time appear exceedingly imminent."

Not only in the opinion of the judges forming the majority of the court were such efforts not made, but they were unable to perceive even upon the evidence of the plaintiff himself any reason why those efforts were not made. Their Lordships agree with that view; and therefore they will humbly advise Her Majesty that the judgment of the court below, refusing to make the rule absolute for a new trial, be reversed, that the rule be made absolute for a new trial, and that the costs of the first trial and of this appeal do abide the event.

Solicitors for the appellant: Messrs. *Dawes & Son*.

Solicitors for the respondent: Messrs. *Hill & Son*.

C A S E S
DETERMINED BY THE
COURT OF QUEEN'S BENCH,
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,
IN AND AFTER
HILARY TERM, XXXVIII VICTORIA.

[Law Reports, 10 Queen's Bench, 140.]

Jan. 15, 1875.

*THE LEATHER-CLOTH COMPANY v. HIERONIMUS. [140]

*Statute of Frauds (29 Car. 2, c. 3), s. 17—Sale of Goods—Memorandum in Writing—
Variation by Seller in Performance of one of Terms—Ratification by buyer.*

The defendant's son, H., junior, gave a verbal order in London on the 18th of February, 1870, to the plaintiffs to send three cases of leather-cloth to the defendant at Cologne; the plaintiffs had been in the habit of forwarding goods to the defendant through H. & P., Rotterdam, and H., junior, being informed that the port of Rotterdam was blocked with ice, directed that the three cases should be sent through Messrs. G., Ostend. When the plaintiffs had executed the order Rotterdam was again open, and Messrs. G. had given up their Ostend route. The plaintiffs therefore forwarded the three cases through H. & P., via Rotterdam; and on the same day, the 1st of March, they forwarded the invoice from the plaintiffs to the defendant, giving the price, &c., with a letter, in which they said: "Inclosed we hand you invoice of three cases leather-cloth. This order came through Mr. H., junior, who instructed us to send it through Messrs. G., Ostend, but as they have given up that route we have sent it through H. & P., Rotterdam, as before." The defendant received but did not answer this letter, but gave further orders for goods to the plaintiffs, which were forwarded via Rotterdam. The ship by which the three cases were sent was stranded and the goods damaged. On the 28th of June the plaintiffs wrote to the defendant, inclosing their statement of account, and requesting payment; and on the 5th of July defendant wrote to plaintiffs, acknowledging the receipt of the statement, and saying, "In looking over your statement I find you have charged me for goods which have been entirely lost in the sunk ship, being sent via Rotterdam. You state in your letter of March 1st that Mr. H., junior, instructed you to send the goods through Messrs. G., via Ostend, but on account of their having given up that route you sent, without any instructions, the goods via Rotterdam." Further correspondence ensued, and defendant having refused to pay for the three cases, an action was brought, and the above facts and correspondence appeared on the trial.

The judge ruled that there was sufficient memorandum in writing, signed by the defendant, of the contract; and left it to the jury to say, from the silence and subse-

1875

Leather-Cloth Co. v. Hieronimus.

quent conduct of defendant, whether or not there had been an assent by him to the change of route from Ostend to Rotterdam before the loss; and they found in the affirmative, and a verdict passed for the plaintiffs:

Held, that there was sufficient memorandum of the original contract; and that there was evidence from which the jury might find that the defendant had assented to the substituted performance in the change of route, which assent need not be in writing.

ACTION, on the common counts, to recover £52 4s. 6d., the price of leather-cloth sold and delivered by the plaintiffs to the defendants.

Plea: never indebted. Issue joined.

At the trial before Archibald, J., at the London sittings [41] after *Michaelmas Term last, it appeared that the plaintiffs, a company for the manufacturing of leather-cloth, &c., in London, had been in the habit of supplying goods to the defendant in Colonge, and of sending the goods through Messrs. Hudig & Pieters, Rotterdam, the defendant's agents. On the 18th of February, 1870, the defendant's son, acting as his father's agent, came to the office of the plaintiffs in London, and ordered by word of mouth three cases of leather-cloth. He was informed by the plaintiffs' manager that the port of Rotterdam was blocked with ice, and he was asked how the cloth was to be sent, and he said they had better, in that case, forward it to Messrs. Gaudet Frères, Ostend. Before the order could be executed by the plaintiffs the port of Rotterdam was again open, and Messrs. Gaudet had ceased to receive goods to be forwarded via Ostend. The plaintiffs accordingly shipped the goods to be forwarded by the old route through Hudig & Pieters, Rotterdam; and on the 1st of March the plaintiffs wrote to the defendant the following letter:

"Inclosed we beg to hand you invoice of W H 30/32 3 cases leather-cloth. This order came through Mr. Hieronimus, junior, who instructed us to send it through Messrs. Gaudet Frères, Ostend, but as these gentlemen have given up their Ostend route, we have sent it through Messrs. Hudig & Pieters, Rotterdam, as before." (Signed by the authorized agent of the plaintiffs).

This letter was duly received by the defendant, but no answer was returned. A few days afterwards the ship on which the cases had been shipped was stranded off Rotterdam, and the leather-cloth was spoilt or injured.

On the 28th of June the plaintiffs wrote as follows: "We take the liberty to hand you inclosed statement of your account with us, showing a balance of £125 4s. 6d. in our favor, and to request you, as some of the items are now overdue, to favor us with a remittance as soon as possible."

To which the following reply was sent:

"Cologne, July 5th, 1870.

"I am in receipt of your letter, June 28th, with statement, but as Mr. Hieronimus is out of town for a few weeks, it will be settled after he has returned. In looking over your statement, I find that you have charged me for the goods which have been entirely lost *by the sunk [142 ship Ravensburg, being sent, via Rotterdam. You state in your letter, March 1st, that Mr. Hieronimus, junior, instructed you to send the goods through Messrs. Gaudet Frères, via Ostend, but on account of their having given up the Ostend route, you sent without any instructions, the goods through Messrs. Hudig & Pieters, Rotterdam. In the first place, I learn that Messrs. Gaudet Frères would not have refused the goods, although they seemed to have given up that line, as they have a correspondent in Ostend. Secondly, I certainly expected you would have informed Mr. H., junior, of it, and asked him how you were to send it in that case, as he had given the direction of sending the goods." (Signed by procuration for the defendant).

The defendant wrote again to the plaintiffs:

"Cologne, 20 Sept. 1870.

"The statement you sent me on the 28th of June, ac., shows a balance in your favor of £125 4s. 6d. You will remember the unhappy accident that has befallen your shipment of 20th Feby., and that it has not been my fault if, by your directing this shipment via Rotterdam instead of the way prescribed, via Ostend, it has been lost by gross average.

"I am, therefore, very sorry to be obliged to decline all responsibility respecting this shipment of 28th Feby., the amount of which is to be deducted off the above balance—

	£	s.	d.
	125	4	6
Less .	52	4	6
	73	0	0
To add shipment 11th July .	48	6	6
Balance .	121	6	6."

Between the 1st of March and the 28th of June further orders had been given by the defendant and executed by the plaintiffs, and the goods forwarded via Rotterdam.

It was objected, on behalf of the defendant, that there was no evidence of the original or substituted contract to

1875

Leather-Cloth Co. v. Hieronimus.

satisfy the Statute of Frauds. The learned judge ruled that there was sufficient evidence of a memorandum in writing [143] signed by the defendant or *his agent, of the original contract, in the letter of the 5th of July, referring to the plaintiff's letter of the 1st of March, together with the invoice. And he left it to the jury to say, whether or not, from the silence after the receipt of the letter of the 1st of March and subsequent conduct of the defendant, there had been an assent by him to the change of route from Ostend to Rotterdam, before the loss.

The jury found in the affirmative; and a verdict passed for the plaintiffs for the amount claimed.

F. Turner moved for a new trial on the ground of misdirection; contending that as there was nothing in writing of the defendant's to show his assent to the change of route, there was no memorandum in writing signed by the defendant of the substituted contract, within the Statute of Frauds. He admitted that, on the authority *Wilkinson v. Evans* ⁽¹⁾ there was a sufficient memorandum of the original contract; but he contended that the substituted contract as to the mode of delivery must also be evidenced by writing, as the mode of delivery was an essential part of the contract ⁽²⁾.

COCKBURN, C.J.: I am of opinion that there ought to be no rule. The objection to the judge's ruling is that there was no written memorandum within the Statute of Frauds. There was at first no written contract, the order to the plaintiffs was verbal by the defendant's son; but on the 1st of March the plaintiffs sent a letter to the defendant with an invoice of the goods, giving the price, &c., charging him as purchaser, which satisfied the statute, so far as the plaintiffs were concerned; and the letter further added that, though the order had been to send the goods by Ostend, the plaintiffs had sent them via Rotterdam. The defendant, therefore, became at that time aware of what route the goods were coming by, and he made no objection whatever. It may be observed that the Rotterdam route by the particular agents was by the course of business the route which the defendant was known to prefer, and the defendant's son [144] directed the route to be changed to Ostend *merely because the port of Rotterdam was blocked with ice. It turned out that at the time the goods were ready the Ostend route was no longer available, because the agents had discontinued to send by that route; and the plaintiffs therefore

⁽¹⁾ Law Rep., 1 C. P., 407.

⁽²⁾ See *Noble v. Ward* (Law Rep., 1 Ex., 117; S. C. in Ex. Ch., 2 Ex., 135).

thought it better to send the goods by Rotterdam, and communicated this fact to the defendant. So matters remained till the 28th of June, when the plaintiffs sent in their account; in the meantime, however, further orders had been given by the defendant, and the goods forwarded to him from the plaintiffs by Rotterdam. The defendant's letter of the 5th of July refers to and admits all the terms of the contract; and if there had been no question as to the route, there can be no doubt that this letter of the defendant of the 5th of July, coupled with the letters of the plaintiffs and the invoice to which it refers, would have amounted to a written contract binding on the defendant within the statute.

But it is said on behalf of the defendant, inasmuch as the order admitted by the defendant was the order to send by Ostend, and the goods were sent by the substituted route of Rotterdam, this substitution forms a new contract, and although the substitution may have been ratified by the defendant, yet of that new contract there was no memorandum in writing. In the first place, I doubt whether a direction to deliver to a particular carrier can be said to be part of the contract of sale. No doubt the mode of delivery to the particular carrier is part of that which the seller engages to do, and the sending to another carrier would not amount to delivery to the buyer. But suppose the order had been to send by the Midland Railway Company, and the goods had been sent by the North Western, still, if they arrived quite safely by the North Western, would it be competent to the buyer to refuse acceptance? I think that proposition could scarcely be maintained, the mode of delivery being unimportant so long as actual delivery has been accomplished. But suppose this were not so; it is impossible to say that there was not in this case a written memorandum of the original contract, and that the departure from the terms of that contract in the mode of delivery cannot be ratified by the other party without writing. If he receives the goods, or if he has ratified the mode by which they were sent, he cannot be heard to say that it was a new contract and cannot be enforced because it was not in writing. There was *sufficient evidence in the present case for the jury that [145 the defendant had ratified the route by which the plaintiffs had forwarded the goods; consequently the defendant was bound to pay for the goods, and the verdict for the plaintiffs must stand.

BLACKBURN, J.: I agree that there should be no rule. The contract was by Mr. Hieronimus, junior, and the plaintiffs by word of mouth. But on the 1st of March the plain-

1875

Leather-Cloth Co. v. Hieronimus.

tiffs sent the following letter: [The learned judge read the letter.] On signing this letter, the plaintiffs clearly signed such a memorandum as would charge them within the Statute of Frauds. The facts are, that after the defendant received that letter, he did, by what the jury have found amounted to a waiver, say, by words or conduct, or something equivalent to signs, I make no objection to the mode by which you, the plaintiffs, have sent the goods. Up to that time there was nothing in writing signed by the defendant. But there would have been no defence by the plaintiffs under the original contract, without more, for not sending the goods by Ostend; there would, however, have been a good defence on the facts, amounting to this: "We (the now plaintiffs) satisfied all the essentials of the contract by sending the leather by Rotterdam, with which deviation from the contract you, by word of mouth or by your silence, expressed that you were content;" and it is clear that the defendant would have failed in an action against the plaintiffs for not delivering the goods. But it was argued by Mr. Turner that though the defendant had accepted, by parol, the substituted mode of performance, it would have been necessary for the plaintiffs to show that this acceptance of the substitution was by something in writing signed by the defendant. I do not see on what ground; and I do not think it would have been necessary. But while matters remained as they were, the plaintiffs could not have maintained an action against the defendant for the price, because there was nothing in writing signed by him. However, about four months afterwards, the defendant does write, on the 5th of July, the following letter: [The learned judge read the letter.] The first part of the letter, in the most distinct terms, refers to the plaintiff's letter of the 1st of March, and clearly admits that all that was said in it was quite [46] *true. And the latter part of the letter goes on to say that the plaintiffs ought to have obtained the defendant's sanction to the change of route from Ostend to Rotterdam. This letter was signed by the defendant or his agent, and therefore the statute has been satisfied, and there is a memorandum in writing of the contract, signed by the defendant, the party to be charged, or his agent. But it was argued that though there was that letter of the defendant to the plaintiffs, saying, Your statement is perfectly true, yet, as it went on, not to ratify, but to object to the substituted delivery, there was no assent in writing to the substituted contract. The answer is: The plaintiffs do not rely on a substituted contract, but on the original contract; and they

say, You, the defendant, on being told of the substituted delivery, did not object, but by your conduct, assented to it. I cannot see why the assent to a substituted mode of performing one of the terms of a contract need be in writing and may not be by parol, though the original contract must have been in writing. They are quite different things, the proof of a substituted contract and the proof of a ratification or approval, after performance, of the substituted mode of performance. Then I think there was evidence enough for inferring this ratification or approval by the defendant; and my Brother Archibald is not dissatisfied with the verdict.

MELLOR, J.: I desire to add nothing to what has already been said by my Lord and my Brother Blackburn.

ARCHIBALD, J.: I am of the same opinion. The fallacy in Mr. Turner's argument arises from the confusion between the evidence of the contract and the evidence of the performance. There was clearly the proper evidence of a contract of sale of leather-cloth to be sent by Ostend, viz. the letter of the defendant of the 5th of July, referring as it did to the plaintiffs' letter of the 1st of March inclosing the invoice. What was the evidence as to how that contract was performed? The plaintiffs forwarded the goods by Rotterdam instead of Ostend; but the jury found, on satisfactory evidence, that the delivery in the old accustomed way through Hudig & Pieters, Rotterdam, was ratified or assented to by the defendant. The evidence was, that after the receipt of the *plaintiff's letter of the 1st of March, [147 with the invoice, no objection was made by the defendant for four months; and there was also the circumstance that other orders had been given by the defendant, and the goods sent by the plaintiffs in the old way. These facts and the long silence satisfied the jury that the defendant had made no objection, but had waived the change from Ostend to Rotterdam; and I thought the evidence sufficient to justify the jury in so finding. There is clearly no necessity that the waiver should have been in writing. The verdict ought, therefore, to stand.

Rule refused.

Attorney for defendant: *W. F. Stokes.*

See note 2 Eng. Rep., 315, and *Ridgway v. Wharton*, 6 House of Lords cases, 238.

[Law Reports, 10 Queen's Bench, 152.]

Jan. 20, 1875.

152] *HALL, Appellant; NIXON, Respondent.

Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 34—Local Board of Health—By-laws, Validity of.

A local board of health made by-laws, under s. 34 of the Local Government Act, 1858 (21 & 22 Vict. c. 98): "6th. Every person intending to erect any new building shall give fourteen days' notice, to be delivered to the board's surveyor, or left at his house, with detail plans and sections, and any person who shall erect any new building without delivering such notice and plans and sections, or without having the plans, &c., approved by the board, shall be liable to a penalty of 40s." By by-law 36, the board may cause to be altered or pulled down any building begun or done in contravention of the by-laws:

Held, that the 6th by-law was within the powers conferred by s. 34, and was reasonable, and therefore valid.

Young v. Edwards (33 L. J. (M.C.) 227); and *Hattersley v. Burr* (4 H. & C. 523) discussed.

CASE stated by justices of the borough of South Shields under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, the surveyor of the corporation of the borough, being the local board of health, against the respondent, under the 6th by-law made by virtue of 21 & 22 Vict. c. 98, s. 34, by the board, charging that the respondent, on the 13th of January, 1874, did unlawfully erect a certain building, to wit, a certain dwelling-house in Challoner Grove, in the said borough, without first giving fourteen days' notice in writing to the surveyor of the board, and leaving with him the plans and sections of such building and having the same approved of by the said local board, contrary to the building by-laws of the said borough.

At the hearing it was proved that on the 13th of January the surveyor visited the new buildings in course of erection in Challoner Grove by respondent, and found him building two houses, for which he had not previously submitted detail plans and sections as required by the 6th by-law of the board. On the same day the surveyor had caused a notice to be given to the respondent, forbidding him to build further until he had furnished plans, and had them approved by the board. The respondent thereupon submitted plans to the board, and at their next meeting the plans for 153] *some cause were rejected, and a prosecution ordered against the respondent for a breach of the 6th by-law.

It was contended on the part of the appellant that it was immaterial for the respondent to show that he was comply-

ing in all respects with the by-laws, as to the construction of the buildings, sufficiency of space about the buildings, or the drainage. The respondent had committed an offence by not having given fourteen days' notice and submitted detail plans and sections and had them approved by the board, as required by the 6th by-law, before building; and the local board pressed for a conviction.

It was admitted that a plan called an estate plan had been passed by the local board about two years ago for the building of twenty houses to compose when completed the street called Challoner Grove, which plan complied with the requirements of the by-law as an estate plan. This plan was submitted by the owner of the ground and not by the respondent. It showed the level and width of the street, and the yard space behind the houses when built, also the house drainage, their size, depth, and inclination. The owners of the ground had from time to time sold off sites, and the respondent was a purchaser of several of them. It was admitted on the part of the respondent that in respect of the two houses recently commenced no plans had been delivered to the board, but that of itself, it was contended, was not an offence punishable by justices in a summary manner; that the respondent was building according to the plans passed by the board as an estate plan, which gives the line of street and yard area behind, and that in all other respects he was complying with the building by-laws of the board, which provides for the construction of houses, and that in respect of the two houses just recently commenced, he was building them upon plans passed by the board for the two houses there immediately adjoining, the two just commenced being intended to be exactly the same, and conformable in every way to the by-laws. It was further contended on the part of the respondent that if the respondent was building anything contrary to the building by-laws, he was not punishable in a summary manner by justices; but that the local board might, under their 36th by-law, order the buildings, or any of them, to be removed or altered, and, in case of default, the board might proceed *to pull down such [154 buildings to the extent to which the same might be an infraction of the by-law.

By 21 & 22 Vict. c. 98, s. 34, ss. 53 and 72 of 11 & 12 Vict. c. 63 are repealed; and in lieu thereof it is enacted as follows:

Every local board may make by laws with respect to the following matters:

(1.) With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof.

1875

Hall v. Nixon.

(2.) With respect to the structure of walls of new buildings for securing stability, and the prevention of fires.

(3.) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings.

(4.) With respect to the drainage of buildings, to water-closets, privies, ash-pits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation.

And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets, or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun, or done in contravention of such by-laws: Provided always that no such by-law shall affect any building erected before the date of the constitution of the district.

The 6th by-law is as follows:

Every person who shall intend to erect any new building shall give fourteen days' notice to the local board of such intention, by writing, delivered to the surveyor of the local board, or left at his office, and shall at the same time deliver to such surveyor, or leave at his office, detail plans and sections, drawn in ink, on drawing-paper, tracing-cloth, or mounted tracing-paper, on a scale of one-eighth or one-quarter of an inch to every foot, of every floor of such intended new building, showing the thickness of the walls, the dimensions of the rooms, the situation of the fire-places, stoves, chimneys, and flues, and generally the position, form, and dimensions of the several parts of such building, and of the water-closet, privy, gully, and drain, ashpit, coal-house, and all other buildings and appurtenances connected therewith; and such plans and sections shall be accompanied by a description of the materials of the building, the mode in which it is proposed to be constructed, and the number of the site on estate plan it is intended to occupy.

1. Walls of proposed buildings to be colored red; walls of adjoining buildings (if any) Indian ink, or some dark color; timbers yellow; all rooms and parts covered with a roof to have a light wash of burnt sienna or a light yellow color; yard and foot pavement to have a light wash of blue.

The plan and section to be neatly inked in with Indian ink.

2. Every plan submitted for the approval of the corporation must be lodged at the borough surveyor's office on the Tuesday previous to the fortnightly meeting of the Town Improvement and Public Health Committee.

A block plan in all cases, where no estate plan shall have been deposited and approved, shall, if so required by the local board, be lodged at the borough [155] *surveyor's office as aforesaid, drawn in ink on drawing-paper or mounted on cloth to the scale of one inch to every forty-four feet, showing the position of the buildings and appurtenances of the properties immediately adjoining to the extent of six feet at least on all sides, the width or level of all streets abutting thereon, the level of the lowest floor of the intended building, and of the yard or ground belonging thereto. The plan shall show also the proposed lines of house drainage and their size, depth, and inclination: Provided always, that the local board shall within fourteen days after receiving such notice, detail plans, and sections signify to the persons giving or sending the same whether they approve or disapprove thereof, and if they shall disapprove thereof, shall at the same time give the reasons why they disapprove of such plan.

Any person who shall erect any new building without giving such notice, and delivering such plans and sections as aforesaid, or without having the said plans and sections approved of by the local board, or in anywise contrary to plans and sections which have been approved of by the local board, shall be liable for each offence to a penalty of 40s.

By-law 36 is as follows :

Where any work has been begun or done in contravention of the foregoing by-laws, or any of them, it shall be lawful for the local board to give notice to the builder or other person who has done or doing such work, and the person for whom the same has been or is being done, of the particulars in which the said by-laws have not been complied with. The said notice shall be served in the manner prescribed for the service by a local board of the notice referred to in the Local Government Act, 1858, s. 75. And it shall call upon the parties respectively to whom it is directed, to appear at a time and place therein named (which time shall not be less than seven clear days from the service thereof), and then and there to show cause why the said work should not be removed, altered, or pulled down. If, after hearing the said parties, or such of them as shall appear in pursuance of the said notice, the local board shall be of opinion that no sufficient cause has been shown to the contrary, it shall be lawful for the said local board to make an order, in writing, under the hand of their clerk, requiring the parties to whom the said notice is directed, and each of them, to remove, alter, or pull down the said work, as the case may, in the opinion of the local board, require, and within such time as to the said local board shall seem reasonable. Such order shall be served on the said parties respectively, in the same manner as the said notice, and if the surveyor of the said local board shall certify to them that, at the expiration of the time named therein, the said order had not been complied with, the local board may, if they think fit, cause such work to be removed, altered, or pulled down, as directed in the said order.

The justices carefully considered the latter part of s. 34, and not only the 6th by-law, but the succeeding ones, and they were of opinion that as an estate plan had already been passed and approved of by the board, showing the whole of the houses to be built in Challoner Grove, there had been compliance with the *by-law, so far as the statute [156 empowered the board to make one; and that the respondent had committed no offence in law by not delivering detail plans and sections; and they decided that the local board had no power to make an order constituting the respondent's conduct in this case an offence; and that the by-law went beyond the powers given to the board by the Local Government Act, 1858.

The question for the opinion of the court was, whether the construction the justices put upon the statute as applicable to this case was correct, and whether the 6th by-law alleged to be made in pursuance of it was reasonable, and within the powers of the board as conferred by the statute.

C. Russell, Q.C. (with him *Dixon*), for the appellants: The 6th by-law is perfectly reasonable, and is within the express power given by s. 34 of 21 and 22 Vict. c. 98. Nothing is said about imposing penalties by that section, but by s. 4 that act and 11 & 12 Vict. c. 63, are to be read together as one act, and by s. 115 of 11 & 12 Vict. c. 63, power is expressly given to impose reasonable penalties not exceeding £5 for any breach of the by-laws. Here the pen-

alty is 40s. only. And by s. 129 these penalties are to be recovered before justices. Reliance seems to have been placed on the 36th by-law as inconsistent with the 6th, or, at any rate, as making it unnecessary, and therefore unreasonable; but the two are perfectly consistent. By-law 6 requires notice previous to building, with a penalty for beginning to build before the plans have been approved, which must be within fourteen days; and then, as a penalty of 40s. would not be sufficient if the builder built a building not according to the by-laws, by-law 36 is added, and gives power to the board in such a case to pull the building down. There is nothing unreasonable in fining a man for not giving proper notice, although he may build in accordance with the by-laws.

Herschell, Q. C. (*Crompton* with him) for the respondent: There is no power to impose a penalty for the breach of a by-law, unless that power is expressly given.

[LUSH, J.: Surely the power to impose a reasonable penalty is incident to the power to make a by-law; a pecuniary [57] penalty is *the appropriate remedy for the breach of a by-law: see 5 Rep., 63 b.]

Not when, as here, there is another remedy given for enforcing obedience, viz., the pulling down of the building. The matter, however, is not without authority, and there are two or three cases very much in point against the validity of this by-law. In *Hattersley v. Burr* (*) it was held that a local board had no power to make a by-law, that before beginning to dig or lay the foundation of any new building a written notice of one month, at the least, shall be left with the clerk at one of the monthly meetings of the board, with plans and sections, with a penalty not exceeding £5 for neglect in giving notice. Martin, B., thought the proceeding altogether wrong: "It seems to me that if a person gives notice that he is about to build and deposits plans, he may at once commence building. The board have power to inspect the building, and if it is in contravention of the by-laws, they may order it to be altered or pulled down." Pollock, C.B., expressed a similar opinion; and Channell, B., added, "The argument for the respondents must go to this extent, that a man is liable to a penalty of £5 for building on his own land before the month's notice has expired, although the building is in every respect in conformity with the by-laws." Again, in a previous case of *Young v. Edwards* (†) a by-law with continuing penalties for building contrary to the by-law was held *ultra vires*; and the case of *Brown v.*

(*) 4 H. & C., 523.

(†) 33 L. J. (M.C.), 227.

Holyhead Local Board (1) was relied on; but that case is scarcely in point with the present.

C. Russell, Q.C., in reply. In *Young v. Edwards* (2) the by-laws were very different from and far more arbitrary than the present. In *Hattersley v. Burr* (3) the by-law required a month's notice to be given at one of the monthly meetings of the board, so that two months might elapse without the person proposing to build being able to give a notice even, and much more before he could proceed to build. Channell, B., points this out; he says: "The by-law does not simply require one month's notice, but that a month's notice shall be left with the clerk at one of the monthly meetings of the board. Could the board make a provision that, if a person *about to build met the clerk [158 going to a board meeting and gave him the notice, that should not suffice, but that it must be given at a specific period only recurring at considerable intervals?" It may be observed that s. 34 leaves it entirely in the discretion of the board to make such provisions as to notices "as they may think necessary."

MELLOR, J.: I am of opinion that the appellant is entitled to succeed, and that the magistrates were wrong in holding that the by-law was not justified by the terms of the statute. The words of s. 34 as to the power of the local board to make by-laws are very wide and comprehensive, and it enacts that "they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices," &c. Now, it seems to me a perfectly sensible way of carrying that out by making a by-law that before beginning to build a new building notice shall be given to the surveyor of the board, care being taken to require no more than a reasonable notice; and the notice required by the 6th by-law seems perfectly reasonable, and the deposit of the plans required under the circumstances was also reasonable. Therefore, as it seems to me, the by-law with a penalty for disobedience must be the mode of carrying out the act. Two cases were cited for the respondent. I confess I am quite unable to see what the reasons of the court were. The first case, *Young v. Edwards* (2), was about two years before the other, *Hattersley v. Burr* (3), but does not appear to have been cited in it, and in both it is simply said, *per curiam*, the by-law is bad. These cases could not be carried to error, and unless we are quite satisfied with the decisions we must form the best independent

(1) 1 H. & C., 601; 32 L. J. (Ex.), 25.

(2) 33 L. J. (M.C.), 227.

(3) 4 H. & C., 523.

opinion we can. Now it seems to me that, in the present case, the 6th by-law was clearly within the provisions of the act; and I do not agree with Mr. Herschell that because, independently of this by-law, there was also another by-law giving a direct and appropriate remedy by pulling the building down, this by-law, which imposes a penalty for not giving previous notice and depositing plans, should be *ultra vires* or unreasonable.

159] *LUSH, J.: I am of the same opinion. I should not entertain the slightest difficulty were it not for the two cases cited. It seems to me, on reading the acts, that the by-law was clearly within the powers conferred by s. 34 of 21 & 22 Vict. c. 98. Sect. 53 of the previous act (11 & 12 Vict. c. 63) prescribed fourteen days as the time for giving notice to the local board, together with particulars, before beginning to dig the foundations of a new building, and forbade the beginning to build until the particulars had been approved by the board under a penalty of £50. Section 72 had similar provisions as to notice, &c., before beginning to lay out a new street, with a continuing penalty of £20 a day. These sections were repealed by s. 34 of the second act (21 & 22 Vict. c. 98), which, in lieu of them, gives power to the local board to make by-laws as to the same matters. So that, instead of a fixed notice and penalties, the Legislature leaves it to the discretion of the local board; and further, the section gives them express power as to giving notices, and though it says nothing as to penalties, it necessarily gives what the common law implies, namely, the power to enforce the by-laws by penalties. I should have said *a priori*, that the fourteen days' notice given by this by-law would have been perfectly reasonable; and it is to be observed that it is the precise time limited by the repealed section of the first act. Mr. Herschell contended that there was no power to impose a penalty. But a by-law could only be enforced in this way. In 2 Kyd on Corporations, p. 156, it is said: "To secure obedience to a by-law, it is necessary that a penalty of some kind should be annexed to the breach of it, for otherwise the by-law will be nugatory. The only penalty permitted by the law of England is a pecuniary one, though either that may be recovered by action, or the payment of it enforced by distress of the offender's goods. That obedience to a by-law cannot be enforced by imprisonment of the offender or by the forfeiture of his goods there are a multitude of authorities; and the reason assigned is, that these are both against Magna Charta." The board, therefore, could not have enforced this by-law

by pulling down the building, but, by necessary implication, a power to make a by-law implies the power of enforcing it by pecuniary penalty; and then by a subsequent by-law, power is also expressly given in *certain cases to pull [160] down the building. This by-law, therefore, I should have said, was perfectly reasonable and entirely conformable to the statute but for the two cases which have been cited. As to them, I agree with my Brother Mellor, that we are bound to exercise our own judgment in the matter, when there are no reasons given, or those given are unintelligible. In the first case, *Young v. Edwards* (*), the by-law is certainly very comprehensive, and the court said it was bad without giving any reasons; but it would not be difficult to point out that there were parts of it which were not justified. In *Hattersley v. Burr* (**) the former case was not cited; and although there is no judgment, there are some dicta of the judges reported in the latter case which seem to show the reason of the court holding the by-law unreasonable. It required that a month's notice should be given to the surveyor at one of the monthly meetings, so that two months might elapse without the intending builder being able to do anything. I cannot help thinking that the court thought that unreasonable. Channell, B., observes, towards the end of the argument: "The argument for the respondents must go to this extent, that a man is liable to a penalty of £5 for building on his own land before the month's notice had expired, although the building is in every respect in conformity with the by-laws." And certainly a by-law which might prevent a man doing anything for two months I should say was unreasonable. Here the length of notice is only fourteen days, which was the very limit prescribed by the first act. I am therefore unable to see an excess of authority in the passing of this 6th by-law.

QUAIN, J.: I am of the same opinion. I think this is a good by-law, neither *ultra vires* nor unreasonable. I should have no hesitation in saying so but for the two cases cited; as, however, no grounds for their decision are given by the court in either of them, I am unable to say whether our present decision is in conflict with those cases. I do not see that any part of this by-law is bad. The provision requiring fourteen days' notice is reasonable, and it is clearly lawful to impose a reasonable penalty. But it is also clear on the authorities that a by-law may be good in part *and bad in part, provided the parts are separable: [161] per Bayley, J., in *Clark v. Denton* (†) and there may have

(*) 33 L. J. (M.C.), 227.

(**) 4 H. & C., 523.

(†) 1 B. & Ad., at p. 95.

1875

Hall v. Nixon.

been reasons in the cases cited why the penalty was bad and unreasonable; but here it is 40s. only for each offence, and not a continuing penalty as in one of the cases cited. And, as my Brother Lush has said, the appropriate way of enforcing a by-law is by imposing a reasonable pecuniary penalty for the breach of it. Then, had the local board power to make such a by-law? By s. 34 express power is given; and the by-law is within the very words of the section, and is not merely constructively, but literally, within the enactment. I am therefore entirely unable to see on what grounds we are to hold this by-law bad: it is clearly neither beyond the powers of the act nor unreasonable. Mr. Herschell made some objection, that imposing a penalty under the 6th by-law was inconsistent with the power of pulling down the buildings given in the 36th by-law. But the two seem to be perfectly consistent. In the one is a penalty for not giving the notice previous to the building; by the other, if the building turns out contrary to the by-laws, it may be pulled down after it is built. The by-laws provide for both, and both are reasonable provisions.

Case remitted to the Justices.

Attorneys for appellant: *Clarke, Rawlings & Clarke.*

Attorney for respondent: *J. Scott, for Dale, South Shields.*

An ordinance of the common council of the city of New York, authorizing an assessment, passed by the board of assistant aldermen in one year, and by the board of aldermen in a succeeding year, a new board of assistant aldermen having been elected during the time, although approved by the mayor, is absolutely void, and no amendment can give it vitality: *Matter of Beekman's petition*, 19 How. Prac., 518.

As to the manner of passing ordinances, their validity and enforcement, see *Barton v. City of Pittsburgh*, 4 Brews. 373; Abbott's Dig. Corporations, pp. 491, 494, 511-517; Dillon's Municipal Corporations, titles "Ordinances"; Bishop's Statutory Crimes, §§ 208, 211, 553-6, title "Municipal By-Laws;" 1 Bish. Crim. Prac., §§ 832, 1068; United States Digest, title "Municipal Corporations"; Angell & Ames on Corporations, title "By-Laws."

If required to be published and affidavit of publication recorded, cannot prove the publication orally by one who knew of such publication: *Klais v. Palford*, 36 Wisc., 587.

Where a charter gives a common council power to "ordain by-laws relating to wharves and the anchoring, mooring and moving of vessels," and "to appoint all necessary officers to carry the by-laws into effect," and the council passed a by-law creating the office of superintendent of wharves, and giving the officer "full power, to order and regulate, whenever requested by the owner or lessee of any wharf, the mooring of vessels at such wharf." Held that the by-law was not void as delegating to the superintendent of wharves the making of regulations which the charter gave the common council alone the power to make: *Gregory v. City of Bridgeport*, 41 Conn., 76.

A municipal corporation cannot give its ordinances an extra territorial effect, except so far as it may be clearly authorized by the legislature so to do: *Straus v. Town of Pontiac*, 40 Illinois, 301; *Robb v. City of Indianapolis*, 38 Indiana, 48.

And on a prosecution for a violation thereof to warrant a conviction, there

must be proof that the act was committed within the city limits: *Taylor v. Americus*, 39 Georgia, 59.

And was passed and published as required by the charter: *Booth v. Town of Carthage*, 67 Illinois, 102.

An ordinance which conflicts with a general statute of the state, is void though by the charter of the city or village its authorities are authorized to make ordinances upon the subject. An ordinance passed by a municipal corporation prohibiting the sale of spirituous liquors on Sunday, is void so far as it relates to sales by inn-keepers to their lodgers and to lawful travellers, pursuant to their licenses granted under a general statute containing certain restrictions as to sale, but allowing sales to such persons on Sunday: *Wood v. City of Brooklyn*, 14 Barb., 425.

In New Jersey, see *Meyer v. Treasurer*, 37 New Jersey Law Rep., 160.

In California, *Ex parte Hurl*, 49 Cal., 557.

In Connecticut, *State v. Brady*, 41 Conn. 588.

In Illinois, *Schrouchow v. Chicago*, 68 Ill., 444.

So a city ordinance prohibiting the sale of pressed hay without inspection, and imposing a penalty for non-observance, contravenes the provisions of 1 R. S., 574, § 5, and is therefore void: *The Mayor v. Nichols*, 4 Hill, 209.

Although a city may be authorized to pass ordinances imposing new and superadded penalties for acts already penal by the laws of the state: *City of Brooklyn v. Toyndee*, 31 Barb., 283.

The prohibition in a town charter of the keeping in the town, or within a certain distance thereof, spirits or beer for the purposes of traffic, prescribing the penalty therefor and the remedy for its recovery, does not confer upon the town any power to enact an ordinance upon the subject. A power given to a town, by its charter, to prohibit tipping houses and dram shops, does not authorize the town to pass an ordinance prohibiting the sale of spirits and beer in any quantity and for any purpose, except by persons authorized to sell for medicinal, mechanical or manufacturing purposes: *Struus v. Town of Pontiac*, 40 Illinois, 301.

See *Booth v. Town of Carthage*, 67 Illinois, 102.

The same act may constitute an of-

fence both against the state and municipal corporation, and both may be punished without any violation of constitutional principle: *Howe v. Treasurer, etc.*, 37 New Jersey Law R., 146.

A city ordinance regulating the weight and quantity of bread is valid: *Paige v. Fuzackerly*, 36 Barb., 394.

So regulating markets: *Bowling Green v. Carson*, 10 Bush (Ky.), 64.

So under authority to pass by-laws relating to nuisances, an ordinance may be passed declaring a bowling alley kept for hire a nuisance: *Tanner v. Trustees*, 5 Hill, 121; see *Updyke v. Campbell*, 4 E. D. Smith, 570.

So an ordinance of the common council of the city of New York, requiring hoist ways in stores and other buildings to be inclosed by a railing, and closed by a trap-door upon the completion of the business of each day, is a reasonable police regulation, and within the legitimate powers of the corporation: *Mayor v. Williams*, 15 New York, 502, affirming 4 E. D. Smith, 518.

So an ordinance presenting the rate at which the cars of a railroad may be run through a village: *Chicago v. Haggerty*, 67 Illinois, 113.

An ordinance must be reasonable.

An ordinance prohibiting the standing of a railroad train directly across a public street longer than two minutes at one time, is not unreasonable: *State v. Mayor*, 37 New Jersey Law, 348.

A by-law that no drayman or brewer's servant shall be in any of the streets of London after certain hours, is good: *Bowworth v. Harne*, Cases temp. Hardwicke, 405, S. C. but not so fully, 2 Strange, 1085.

An ordinance in relation to "bay windows," is valid: *Commonwealth v. Goodnow*, 117 Mass., 114.

An incorporated town in Indiana, is authorized, by statute, to prohibit, by ordinance, riding or driving in its streets faster than an ordinary trot, and to inflict a fine therefor.

Such an ordinance inflicting a fine upon any person who shall wilfully, etc., ride or drive animals on its streets "faster than an ordinary trot," is authorized by statute, and is not unreasonable, and the description of the gait is not vague or uncertain.

A marshal of an incorporated town of Indiana may by statute arrest on

1875

Hall v. Nixon.

view for a violation of an ordinance, and is not liable in damages for false imprisonment merely because he made the arrest without warrant: *Nealis v. Haywood*, 48 Indiana, 19.

The charter of a city authorized the common council to pass ordinances upon certain subjects pertaining to the police, good order and welfare of the city, and provided that a violation of certain of such ordinances should be a misdemeanor, and might be prosecuted as such before the police court of the city like other offences, which court might inflict thereon the penalty named in such ordinance, provided that no penalty should exceed the sum of fifty dollars for a single offence. Held, that the charter did not attempt to confer upon the common council the power to define and determine what should be crime, and was not therefore unconstitutional: *State v. Tryon*, 39 Conn., 183.

A city, pursuant to its charter, passed an ordinance prescribing the limits within which wooden buildings should not be built, and a penalty for a violation of the ordinance: Held that the ordinance was valid.

It seems that the common council of a city, where an ordinance exists forbidding the erection of wooden buildings within certain limits, cannot delegate to a committee the power conferred by the charter to give a consent that a wooden building may be erected within such limits.

In an action by a city for the violation of an ordinance forbidding the erection of wooden buildings within certain limits, the defendant claimed that he had the consent of the common council to erect a wooden building. It appeared that notice of defendant's application for a consent had not been published in the manner required. Defendant offered to show that his application to the common council had been referred by the common council to a committee with power. But the consent given by the committee was not signed by all the members of the committee. Held that the offer was properly rejected: *City of Troy v. Winter*, 4 N. Y. Supreme Ct. Rep., 256, 2 Hun, 63.

Where the charter authorized the city to pass ordinances to prevent the erection of wooden buildings within such

parts of the city as the corporate authorities might define, an ordinance forbidding the erection of any building within certain limits, other than of brick, stone, iron or other material of an incombustible nature, was held void as exceeding the power conferred, which was simply to prohibit the erection of wooden buildings: *Attorney General v. Campbell*, 19 Grant's (Upper Canada) Chy., 299.

See also *City of Keokuk v. Scroggs*, 39 Iowa, 447.

The charter of the city of New Haven authorized the common council of the city to make ordinances to protect the city from fire, and to establish districts within which it should not be lawful, without a license, to erect any wooden building. The common council passed an ordinance establishing a fire district and forbidding the erection or placing of any wooden building within the district, without license given by the board of aldermen, declaring that such a building should be deemed a common nuisance, and making it the duty of certain officers, after reasonable notice, to abate it. Held that the ordinance was fully authorized by the charter and was reasonable. The prompt enforcement of such an ordinance in case of its violation is important to the public safety, and a court of equity will not interfere by injunction to prevent such enforcement, but leave the party aggrieved to his legal remedy if he is entitled to any remedy. It is not a reason for the interference of chancery that the building has become real estate. It has become so by the unlawful act of the owner, and is such only in the most technical sense, and the value of the building can be easily ascertained and proved.

Nor is it a sufficient reason for such interference that the owner had obtained the consent, individually, of a majority of the aldermen, notice being given to him that the board when in session might refuse its assent, as it afterwards did. Nor that he had, after placing the building, covered it with a sheathing of iron and tinned the roof, before proceedings were instituted against him, and had by further work upon it during the pendency of the proceedings made it substantially fireproof. The city authorities are the

proper judges as to how far these facts should affect their action.

And held that the fact that the city, exempt itself from responsibility on the ground that the duty was a public one, might employ persons to demolish the building who were of no pecuniary responsibility, was not entitled to consideration so long as nothing appeared to show any such purpose on the part of the city: *Hine v. City of New Haven*, 40 Conn. 478.

The enlarging and fitting up as a livery-stable, in Boston, within one hundred and seventy feet of a church, from a dwelling-house which was built before the passage of the statute of 1810, chapter 124, is an "erecting" of a livery-stable within the meaning of that statute, and, while the building is used as a livery-stable, renders the owner or keeper thereof liable to the penalties imposed by that act: *Hastings v. Aiken*, 1 Gray (Mass.), 163.

As to what trades may be declared by the common council or board of health of a city, under its charter, to be nuisances and proceedings thereunder, see Moak's note to Clarke's Chancery (ed. 1869), 350, marg. p. 344; Moak's Van Santvoord's Pleadings, 393, 395-6, 477, 686; *Metropolitan Board v. Heister*, 37 N. Y. 661; *Schuster v. Metropolitan Board*, 49 Barb., 450; *Van Wormer v. The Mayor, etc.*, 15 Wendell, 263; *Reynolds v. Schultz*, 34 How. Prac., 147; 4 Robertson, 282; *Stewart v. Board*, 33 How., 3; *Cooper v. Board, etc.*, 33 How. Prac., 5; *Weil v. Schultz*, 33 How. Prac., 7; *People v. Board, etc.*, 33 How. Prac., 52; *Slaughter House Cases*, 16 Wallace U. S., 36; *Taylor v. State*, 35 Wisconsin, 298; *Mayor v. Second Av. R. R.*, 32 N. Y. Rep., 261; *Mayor v. Third Av. R. R.*, 33 N. Y. Rep., 42; *Mooney v. Mayor, etc.*, Irish Rep., 6 Com. Law, 226.

The violation of a city ordinance is not a crime unless declared so by statute: *Wood v. City of Brooklyn*, 14 Barb., 425; *Schneider v. McLane*, 36 Barb., 495, 4 Abb. Court of Appeals Dec., 154.

See *City of Rochester v. Upman*, 19 Minnesota, 108; *Dorling v. City of St. Paul*, 19 Minnesota, 389.

A misdemeanor is an act or omission for which punishment other than death or imprisonment is denounced by a statute, that is by a legislative act.

It is doubtful whether the legislature

has the power to enact in the charter of a city, that the violation of an ordinance, which the city may thereafter pass, shall be a misdemeanor: *Pillsbury v. Brown*, 47 California, 478.

But see *City of Brooklyn v. Toynbee*, 81 Barb., 283.

Power to punish offenders against ordinances by fine or imprisonment, does not include authority to coerce payment of a fine by imprisonment: *Briswick v. Mayor*, 51 Geo., 639.

An individual may associate with thieves, &c., without being guilty of any offence, for it is not the business of the legislature to keep guard over individual morality; but if such person so associates with a design to aid, abet or promote, or in any way assist the parties charged with, or suspected of, being thieves prohibitory legislation may be applied, not to correct the evil consequences which such association may bring on the individual, but to protect society from actual or anticipated breaches of law.

The ordinance of the city of St. Louis prohibiting the "knowingly associating with persons having the reputation of being thieves and prostitutes" is void, as invading the right of personal liberty: *City of St. Louis v. Fitz*, 53 Missouri, 582.

See also *Dorling v. City of St. Paul*, 19 Minnesota, 389; *Robb v. City of Indianapolis*, 38 Indiana, 49.

Whether the owner of a hack who is personally without fault, can be held to answer for a non-observance of an ordinance directing him to have two lighted lamps to his carriage when driving it in the night time, *query*? He certainly cannot be so held when the hack is being used by some person not then acting in his service, and without his knowledge or consent, as when the driver, being in his employ as day driver uses the hack for his own purposes, in the night time, unauthorized by him and without his knowledge: *Campbell v. City of Providence*, 9 Rhode Island, 262.

Whenever a municipal corporation is authorized to make by-laws relative to a given subject, and to require of those who desire to do any act or transact any business pertaining thereto to obtain a licence therefor, the reasonable cost of granting such licences may be properly charged to the persons pro-

1875

Aberdare Local Board v. Hammett.

curing them, although the power to do so is not expressly given by the charter.

Therefore, where the charter of the city of New Haven empowered said city to make and enforce by-laws to protect the city from fire, to establish districts within which it should not be lawful to erect, enlarge or elevate any wooden building except by license from the city, and to enact ordinances relating to the subject, and prescribe penalties for their violation; and ordinances of said city provided that no person should build or enlarge any building within the fire limits, without

a license first issued by the fire marshal, for which license a fee of fifty cents was required to be paid: Held that the license fee required was not a revenue tax in any proper sense, but rather a reasonable sum collected of the party interested for the purpose of defraying in part the expenses of issuing and recording the license, and that the power to require such a fee was conferred by the charter, by intendment, as convenient if not essential, to the full enjoyment of the powers expressly granted: *Welch v. Hotchkiss*, 30 Conn., 140.

[Law Reports, 10 Queen's Bench, 162.]

June 20, 1875.

162] *THE ABERDARE LOCAL BOARD OF HEALTH, Appellants; HAMMETT, Respondent.

Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 13, subs. 5—"Fabrication" of Voting Paper—Mens rea.

At an election of a member of a local board of health, a voting paper (form sch. A to 11 & 12 Vict. c. 63) was delivered at the house of E. R., a voter; the wife of the voter, having her husband's authority, put a cross at the bottom of the paper, and the respondent then put E. R., the voter's initials, in the margin opposite the name of the candidate for which the vote was intended, and the respondent signed his name as witness to the mark of the voter. An information having been laid against the respondent under 21 & 22 Vict. c. 98, s. 13, subs. (5), for "fabricating" the voting paper; the justices dismissed the summons, finding, on the above facts, that the respondent *bona fide* believed (as the fact was) that the wife had authority to put her husband's name to the paper, and that the respondent had no criminal or unlawful intention in putting his name as witnessing the mark of the voter:

Held, that the justices were right: for that *mens rea* was necessary to constitute the offence.

CASE stated by justices of Glamorganshire under 21 & 22 Vict. c. 43.

At petty sessions held at Aberdare, on the 21st of October, 1873, an information, by the appellants against the respondent under 21 & 22 Vict. c. 98, s. 13, subs. 5, charging that he did fabricate a certain voting paper, was heard (').

From the evidence it appeared that an election took place

(') By 21 & 22 Vict. c. 98, s. 13, subs. 5: "If any person fabricates, in whole or in part, alters, defaces, destroys, abstracts, or purloins any voting paper, or personates any person entitled to vote in pursuance of the Public Health Act, 1848, or this act, or falsely assumes to act in the name or behalf of any person so en-

titled to vote, or interrupts the distribution of any voting papers, or distributes the same under a false pretence of being lawfully authorized so to do, he shall for every such offence be liable, on conviction before two justices, to be imprisoned for any period not exceeding three months, with or without hard labor.

in August for a member to serve on the Board of Health. There were two candidates, Dr. Price and Mr. Howell Williams. Edward Richards was a person duly qualified to vote. Henry Davies was duly appointed to deliver the voting papers to qualified voters on the 22d of August, and to collect them on the day of election, the 26th of August following.

On the 22d of August a voting paper was left by the collector *at the house of Edward Richards, of which [163 fact Richards was aware. On the following day, the 23d of August, the respondent, with Williams, the candidate, called at the house of Edward Richards to canvas him for his vote on behalf of Williams. Richards was not at home; but his wife was, and upon being asked for her husband's vote in favor of Williams, she consented to give it, and made a + at the bottom of the voting papers; the respondent at the same time witnessed the mark of the wife, describing it as the mark of the voter, and affixed the initials of Edward Richards to the name of Howell Williams in the margin (').

Richards was aware that his wife had so signed the paper as he swore upon the hearing of the information, "I leave such matters to her, and I did so this time as I have done many times before, because I think she is wise and capable enough to do it."

The respondent affixed his signature as witness to the mark of the wife, describing it as the mark of the voter, and the initials of Edward Richards in the margin, *bona fide* believing that she was entitled to sign on behalf of her husband, and that, in doing as he did, he was in no way acting contrary to the act; and he left the voting paper open for the husband's inspection.

On the day of election, the 26th of August, the collector called at the house of Richards for the voting paper, but was told it had been mislaid, and no voting paper was either tendered or sent in on behalf of Edward Richards.

On the 27th of August, the day for counting up the votes, and when no additional voting papers could have been either tendered or received, a relation of one of the candidates induced Edward Richards to go down with the voting paper,

(') By s. 4 of 21 & 22 Vict. c. 98, this act is to be deemed part of 11 & 12 Vict. c. 63. The voting paper was in the form given in sch. A of the latter act; by which, if a voter cannot write, he must affix his mark, but such mark must be attested by a witness, and such witness must write the initials of the voter against the name of every person for whom the voter intends to vote.

1875

Aberdare Local Board v. Hammett.

which had been found, to the office of the Board of Health, where it was produced before the chairman, who was casting up the votes; but the voting paper was not admitted by the chairman, as it had not remained uncollected through the default of the chairman or person appointed to receive it: see 11 & 12 Vict. c. 63, s. 26.

[64] *The justices were of opinion, that at the time the respondent so signed and attested the voting paper he *bona fide* believed that the wife had the authority of her husband to sign his name (which in point of fact she had); and that the respondent had no criminal or unlawful intention in witnessing her signature; and they therefore dismissed the summons.

The question for the court was, whether the justices were bound to find the respondent guilty of fabricating the voting paper.

Pritchard, for the appellants: By s. 4, 20 & 21 Vict. c. 98, is to be deemed one with 11 & 12 Vict. c. 63; and the mode of filling up a voting paper is given in 11 & 12 Vict. c. 63, ss. 20-26, and form sch. A; and in order to be a valid voting paper it ought to have been filled up by the voter himself putting his name or mark; the paper, therefore, which the respondent was a party to filling up, was a false paper, and consequently he was guilty of fabricating a voting paper under 21 & 22 Vict. c. 98, s. 13, subs. 5.

[LUSH, J.: This is made a criminal offence, subjecting the offender to imprisonment, possibly with hard labor, without the option of a fine; to constitute the offence there must be *mens rea*. The respondent believed, as was the fact, that the husband had authorized the wife to put his mark. Suppose the wife had put the mark when the husband was present, could it be contended that the respondent was guilty of fabricating the paper? On the findings of the magistrates, this is precisely the same case.]

The respondent might not have a *mens rea*, but by attesting the wife's mark as that of the voter, and by putting the initials of the voter in the margin, he wilfully did or said what was not the fact, that the mark was the mark of the voter himself. The wilfulness of the act is sufficient, and a mistaken belief as to the lawfulness of the act does not prevent the act being wrong: *Foulger v. Steadman* (*). In *Reg. v. Hartshorn* (*), which was an indictment for forgery at common law by affixing and attesting a person's mark under circumstances similar to the present, Crompton, J., stopped

(*) Law Rep., 8 Q. B., 65.

(*) 6 Cox, C. C. 395, 402.

the case, saying: "This does not amount to forgery, although it is no doubt an irregular proceeding. It appears that the voting papers had been filled up by the defendants, either with the express or implied consent of the voters, or with the consent of some person whom the defendants might reasonably believe to have authority. The voters were all called upon. It is possible that the irregularity committed may be indictable, as it is clear the statute intended that the voter should affix his mark *propria manu*, but the attestation in the mode adopted is not forgery. There is no false statement implied, and the essence of the crime of forgery is making a false entry or signature, knowing it to be without authority and with intent to defraud." It was probably in consequence of this decision that this s. 13, subs. 5, was introduced. And the act now gives a summary mode of proceeding to punish what Crompton, J., thought ought to be indictable in some way.

B. T. Williams, for the respondent, was not called upon.

MELLOR, J.: I am of opinion that the magistrates were clearly right. In order to make a person liable for a criminal offence like this, he must have a guilty intention at the time he does the act; here the respondent thought he was doing nothing wrong, and believed that the wife had the authority of her husband, which she actually had, to put his name to the voting paper. The word "fabricate" occurs along with the words "alters, defaces, abstracts, or purloins any voting paper, or personates any person," all of which import a criminal intention—a *mens rea*; and the legislature must mean such an act as the person doing it must know is wrong, and not such as he believes to be right. There might have been facts which might have induced the magistrates to find the *mens rea*; but here they have found the contrary, and not only that the respondent believed the wife had authority, but that she had the authority of her husband to sign the voting paper for him.

LUSH, J.: I am of the same opinion. We are not called upon to say whether the voting paper, if received in time, ought or ought not to have been admitted. The question is simply whether the respondent "fabricated it in whole or in part." The word "fabricates" imports a wrongful act, an act done with a *mens rea*, which is conclusively negatived by the justices.

*QUAIN, J.: I am of the same opinion. "Fabricate" [166

1875

Aberdare Local Board v. Hammett.

implies fraud or falsehood, a false or fraudulent concoction, knowing it to be wrong and contrary to the act.

Judgment for the respondent.

Attorneys for appellants: *Rickard & Walker, for Gery, Aberdare.*

Attorneys for respondent: *Purkis & Perry, for Phillips, Aberdare.*

See notes 8 Eng. Rep., 312, 10 Eng. Rep., 512, 1 Eng. Rep., 408, 4 Eng. Rep., 223.

The maxim, "*Actus non facit reum nisi mens sit rea*"—"The act itself does not make a man guilty unless his intention were so"—(Broom's Leg. Maxims, 306, 7th Am. ed.), seems to have created much unnecessary confusion and conflict in the decisions of the courts and the conclusions of writers. When construed in connection with another equally well known maxim, "*Ignorantia facti excusat, Ignorantia juris non excusat*"—"Ignorance of fact excuses—Ignorance of the law does not excuse"—(Broom's Legal Maxims, 7th Am. ed., 253), the determination of the facts of a particular case may become an intricate and a delicate task, but when the facts are settled the application of the law is comparatively easy and certain.

If the necessary and inevitable result of an act are directly pernicious, the intent to work mischief becomes a question of law: *Safford v. Wyckoff*, 1 Hill, 11; *Dunham v. Waterman*, 17 N. Y. Rep., 21; *Commonwealth v. Tenney*, 97 Mass., 58; *Com. v. Coe*, 115 Mass., 482.

Parties who riotously tear down a house in the assertion of a supposed right are guilty of a riot, though if they had not acted under a supposed right they would have been guilty of a felony: *Queen v. Casey*, Irish Rep., 8 Com. Law, 408.

See *Beckham v. Nacke*, 56 Mo., 546; 2 Green's Crim. Rep., 619.

When the accused has purposely done an act understanding the facts surrounding the doing thereof he is legally chargeable with an intent to do it, and with the legal consequences of doing it. It is no defence to an indictment for doing an act illegal *per se* that he did not intend to commit a crime or to make himself a criminal if he purpose-

ly did the act. He is bound to know the legal result of the doing: *People v. Brooks*, 1 Denio, 457; *People v. Bogart*, 3 Park. Crim. Rep., 143; *People v. Gardner & Charlack*, *Police Commissioners N. Y.*, 5 N. Y. Supreme Court Rep., 678, 3 Hun, 222, affirmed by Court of Appeals, June 22, 1875; *White v. White*, 105 Mass., 326-7; *People v. Dawell*, 25 Mich., 247; *United States v. Susan B. Anthony*, 11 Blatchford, 200, S. C. 2 Green's Crim. Rep., 208, and note pp. 215-226; see also note to *Com. v. White*, 2 Green's Crim. Rep., 275; *Marmont v. The State*, 48 Ind., 21; *Hamilton v. People*, 57 Barb., 625; *People v. Tinsdale*, 10 Abbott's Prac., N. S., 374; *Schuster v. The State*, 48 Ala., 199.

If one knowing she is not a male person, casts a ballot at an election at which only a male person has a right to vote (*Winans v. Williams*, 5 Kansas, 227; *Miner v. Happersett*, 21 Wallace, 162), she commits a crime and it is no defence for her to say, true I purposely cast the vote, but I did not intend by so doing to make myself a criminal: *United States v. Susan B. Anthony*, before cited.

If the accused did not purposely do the act there is no criminal intent, for he did not intend to do that which the law had declared to be a crime.

When the act is not criminal *per se* but is only criminal if done with a particular intent, such intent must be alleged and proved according to the terms of the statute: *State v. Malloy*, 34 New Jersey Law Rep., 410; *Commonwealth v. Green*, 111 Mass., 393; *Slattery v. The People*, 76 Illinois, 218.

Or if the facts were not known to the accused but he acted upon an erroneous belief as to the same: *People v. Jones*, 54 Barb., 311.

In such cases the law presumes that

every sane man intends the natural and ordinary consequences of the act, but the *intent* is a *fact* which may be established or rebutted by the surroundings of the transaction or by the evidence. The intent becomes a question of *fact* for the jury, for purposely doing of the act is not necessarily and inevitably criminal: *State v. Malloy*, 34 New Jersey Law Rep., 410; *Bluff v. State*, 10 Ohio State Rep., 547; *Woodside v. The State*, 3 Miss. (2 How.), 655, S. C. 2 Morris's State Cases, 95; *Mask v. The State*, 36 Miss., 77, S. C. 2 Morris's St. Cases, 1100; *Jeff v. State*, 39 Miss., 593, S. C. 2 Morris's State Cases, 1422; *Evans v. People*, 49 N. Y., 88; *Com. v. Green*, 111 Mass., 392; *Reg. v. Jarvis*, 7 Cox's Cr. Cas., 53; *Van Pelt v. McGraw*, 4 N. Y., 113-4; *People v. Hamill*, 2 Parker's Crim. Rep., 223; *Com. v. Mason*, 105 Mass., 163; *People v. McDonald*, 43 N. Y., 66; *People v. Johnson*, 1 Park. Crim. Rep., 564; *Kemble's case*, 1 City Hall Rec., 177; *People v. Jones*, 54 Barb., 311.

The question as to who is the owner of property frequently is one of *fact*. In such a case if one *honestly* believing he is the owner thereof do an act relative thereto, he is not punishable criminally therefor, for in so doing he labored under a mistake of *fact* and not of law: *State v. Roseman*, 70 N. C., 235; *Commonwealth v. Stebbins*, 8 Gray, 492; *State v. Bond*, 8 Iowa, 540; *Phelps v. People*, 55 Illinois, 334; *State v. Luther*, 8 Rhode Island, 151.

So if the prisoner honestly believing he has a lien for repairs upon property given him to mend, refuses to give it up without intending to deprive the owner of his *property* in the goods but only to compel him to pay for the repairs, he is not guilty of larceny for an intent to deprive the owner of his *prop-*

erty in the goods is an ingredient in the crime of larceny; otherwise if the jury find as a fact that the assertion of a lien was only a colorable pretence to retain possession: *Reg. v. Wade*, 11 Cox's Cr. Cas., 549.

The question as to whether the court in a case where the *conceded* and *undisputed* facts render the act done by the defendant criminal, has the right to direct and to record a verdict of guilty, is one of some nicety, but as the jury have no legal or moral right to disregard the rules of law applicable to such a case, a case will rarely happen where it can become necessary in order to attain justice that this should be done. The question is one of more subtlety than of practical utility: *Howell v. People*, 5 Hun, 620; *U. S. v. Susan B. Anthony*, 11 Blatchford, 200, 209-212, S. C. 2 Green's Crim. Law, 208, and note pp. 215-226; *Commonwealth v. Magee*, 12 Cox's Cr. Cases, 549; *State v. Buckley*, 40 Conn., 248; *Duffy v. People*, 28 N. Y., 588, affirming 5 Park. Crim. Rep., 321; *People v. Finnegan*, 1 Parker's Cr. Rep., 147; *People v. Bennett*, 49 N. Y., 137, 141; *U. S. v. Fullerton*, 7 Blatchford, 177.

There is little danger in this age and in this country that the court will improperly direct a verdict. If it does the remedy in most cases is ample. The want of a remedy against the same cannot however change the rule of law: *Town of Venice agt. Gould*, 1 Weekly Digest, 154, N. Y. Court of Appeals.

Where the intent is an *essential* element of a crime, for which a prisoner is on trial, he has the right to testify as to his intent in doing any act which is claimed to prove criminal intent: *Kerrains v. People*, 60 N. Y., 221, reversing 1 N. Y. Supreme Court Rep., 333.

1875

Angell v. Duke.

[Law Reports, 10 Queen's Bench, 174.]

Jan 26, 1875.

174]

*ANGELL v. DUKE.

Statute of Frauds (29 Car. 2, c. 3), s. 4—Interest in Land—Collateral Agreement.

Declaration that the plaintiff and defendant had been negotiating for the letting by the defendant to the plaintiff of a messuage, together with the use of the furniture therein, and the plaintiff objected to become tenant on the ground that the messuage was in imperfect repair and insufficiently furnished; that the defendant, in order to induce, as he in fact did thereby induce, the defendant to become forthwith tenant to him of the messuage without requiring the defendant to do any repairs or sending additional furniture into the same previously to the creation of the tenancy, verbally promised the plaintiff that he would within a reasonable time after the creation of the tenancy do such repairs and send additional furniture into the messuage; and thereupon, afterwards, in consideration that the plaintiff, at the request of the defendant, had so forthwith become tenant to the defendant of the messuage without requiring the defendant to do any such repairs or to send into the messuage any such additional furniture, the defendant promised the plaintiff that he would, within a reasonable time, do such repairs and send such additional furniture into the messuage. Averment of conditions precedent. Breach, that the defendant did not perform his last-mentioned promise:

Held, on demurrer, that the agreement declared on did not relate to an interest in land within s. 4 of the Statute of Frauds (29 Car. 2, c. 3); and an action could be maintained upon it though not in writing.

DECLARATION that, before the making of the agreement hereinafter mentioned, the plaintiff and the defendant had been negotiating with each other for the letting by the defendant to the plaintiff, upon certain terms prepared by the defendant, of a certain messuage and premises, together with the use of the furniture and effects then being thereon, as for a furnished house, and the plaintiff had then objected to become tenant to the defendant of the messuage and premises upon the said terms upon the ground that the messuage and premises were then in imperfect order and repair, and insufficiently furnished for the purposes of convenient and comfortable use, occupation, and enjoyment thereof by the plaintiff and his family; and the defendant then, in order thereby to induce, as he in fact did thereby induce, the defendant to become forthwith tenant to him of the messuage and premises upon the said terms without requiring the defendant to do any works or repairs or send any additional furniture or effects into the same previously to the commencement and creation of such tenancy, [175] *verbally promised the plaintiff that he, the defendant, would, within a reasonable time after such creation and commencement of such tenancy, do such works and repairs and send such additional furniture into the messuage and

premises as might be necessary for completing the condition and furnishing of the same for the purposes of such convenient use, occupation, and enjoyment of the same; and thereupon, afterwards, in consideration that the plaintiff, at the request of the defendant, had so forthwith become tenant to the defendant of the messuage and premises upon the terms aforesaid without requiring the defendant, previously to the plaintiff so becoming such tenant, to do any such works or repairs, or send into the messuage or premises any such additional furniture and effects as respectively aforesaid, the defendant promised the plaintiff that he would, within a reasonable time, do such works and repairs and send such additional furniture and effects into the messuage and premises as might be found and be necessary for completing the condition and furnishing of the same for the purposes of the convenient use, occupation, and enjoyment of the same by the plaintiff and his family. Averment of conditions precedent. Breach, that the defendant did not perform his last-mentioned promise.

Demurrer and joinder in demurrer.

Maurice Powell, in support of the demurrer: The agreement set out in the declaration relates to an interest in or concerning land within s. 4 of the Statute of Frauds (29 Car. 2, c. 3), and no action therefore can be brought on the agreement unless it be in writing. In *Mechelen v. Wallace* ⁽¹⁾ an agreement that if the plaintiff would take possession of a house partly furnished, and become tenant on its being completely furnished, the defendant would send into the house all the furniture necessary to furnish it completely, was held to be an agreement for an interest in land. So in *Cocking v. Ward* ⁽²⁾, an agreement between the plaintiff, who was tenant of a farm, and defendant, that if the plaintiff would surrender the tenancy and prevail on his landlord to accept the defendant as tenant the defendant would pay the plaintiff £100, was held to be a contract relating to an interest in land within the *statute. *Cocking v. Ward* ⁽³⁾ [176 was followed in *Kelly v. Webster* ⁽⁴⁾, and approved in *Hodgson v. Johnson* ⁽⁵⁾].

[LUSH, J.: *Morgan v. Griffith* ⁽⁶⁾ is an authority adverse to the plaintiff's contention.]

In *Morgan v. Griffith* ⁽⁶⁾ the court held that a verbal agreement by the landlord to destroy rabbits was collateral to the lease under which the defendant took his farm; but

⁽¹⁾ 7 Ad. & E., 49.

⁽²⁾ 1 C. B., 858; 15 L. J. (C.P.), 245.

⁽³⁾ 12 C. B., 283; 21 L. J. (C.P.), 163.

⁽⁴⁾ E. B. & E., 685; 28 L. J. (Q.B.), 88.

⁽⁵⁾ Law Rep., 6 Ex., 70.

that case, as well as *Mann v. Nunn* ⁽¹⁾, is in conflict with the previous decisions. In the present case the consideration for the promise to do the repairs and send furniture into the house is that the defendant would become tenant of the house. The consideration cannot be severed from the promise; the agreement is one entire contract, and relates to an interest in land within s. 4 of the Statute of Frauds.

Hollings, contra: The agreement to do the repairs and send furniture into the house is collateral to the plaintiff becoming tenant to the defendant, and it is not an agreement in any way relating to an interest in land, and need not be in writing. It is impossible to distinguish this case from *Morgan v. Griffith* ⁽²⁾. In that case, which was an appeal from the decision of a county court, the respondent agreed to take a lease of certain land which he was to execute at a future time. He entered on the land and found it overrun with rabbits; on the lease being tendered he refused to execute it unless the rabbits were destroyed; the appellant declined to put a term to that effect into the lease, but promised that the rabbits should be destroyed; the respondent then executed the lease; the appellant failed to destroy the rabbits, and the respondent sued him for breach of his promise. The county court judge admitted evidence of the parol agreement, and the Court of Exchequer decided that the parol agreement was collateral to the written lease, and had been properly admitted. So here the agreement to repair the house and furnish it is collateral, and is in no way connected with an interest in land.

Powell was heard in reply.

177] *COCKBURN, C.J.: I am of opinion that our judgment should be for the plaintiff. I think this case is undistinguishable from *Morgan v. Griffith* ⁽¹⁾; but independently of that authority, I think, on principle, this is not an agreement within the Statute of Frauds. We must see what the true history of the transaction is, and, of course, the sequence of events. The parties are in negotiation respecting a lease to be granted by the defendant to the plaintiff. The plaintiff objects; he is not satisfied with the condition of the house; and the defendant says to him, "If you will become my tenant," which evidently refers to something to take place afterwards, "I will undertake to put the house in repair, and send more furniture into it." That is something antecedent to the agreement to confer the interest in the land by a lease from the defendant to the plaintiff, and altogether, to my mind, collateral to it. The agreement for a transfer

⁽¹⁾ 43 L. J. (C.P.), 241.

⁽²⁾ Law Rep., 6 Ex., 70.

of the interest in land or the house is posterior. "You having agreed with me that if I agree to become your tenant you will do so and so, I now in consideration of your letting the premises to me, agree to become your tenant;" that would be a contract which has reference to the transfer of an interest in the land. The other is something antecedent and collateral to that contract, that is, a separate agreement entered into in order to induce the intended tenant to accept the tenancy. It seems to me, therefore, that the principle in *Morgan v. Griffith* ⁽¹⁾ is right, and on that ground I think that this is not a case within the statute, and, consequently, our judgment must be in favor of the plaintiff.

MELLOR, J.: I confess I have not been free from doubt upon the question, but upon the whole I have come to the conclusion that this is a collateral agreement to the demise, and it was not part of an agreement between the parties for an interest in land. The terms offered by the defendant were: "If you should become my tenant of this house I will put the house in repair, and supply it with furniture." These terms did not bind the plaintiff to become tenant, and he did not become tenant under them; but when he did become tenant, the defendant was bound to carry out the terms he offered to the plaintiff. It appears to me to be a *collateral arrangement with regard to the supply of [178 the furniture and repairs, and not within the Statute of Frauds.

LUSH, J.: I am of the same opinion. The question is, whether the agreement set out in the declaration, which we must assume to be made in the terms alleged, is an agreement within s. 4 of the Statute of Frauds (29 Car. 2, c. 3). That section says: "That no action shall be brought whereby to charge any person . . . upon any contract or sale of lands, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing." Now, does this declaration set out any contract or sale of land, or any interest in or concerning land? I quite agree, if the contract alleged is a contract containing any material term which amounts to a sale of an interest in land, then all the other terms subordinate to it must stand or fall with it. Now, what is alleged here is: [The learned judge read the declaration.] If it had been a part of the terms that the defendant agreed to let, or the plaintiff agreed to take, I quite agree the whole would have been void, as not

(1) Law Rep., 6 Ex., 70.

being in writing; but there is no such statement. This promise was made as an inducement to the plaintiff to enter into the arrangement. It is collateral, and therefore I do not see, if the plaintiff had refused to become tenant, or the defendant had refused to let him the house, that either would have had a cause of action against the other. The defendant says, in order to induce the plaintiff to complete the tenancy: "When you have become tenant I will put the house in repair and bring in the furniture." No obligation arose until the consideration had been executed by the plaintiff entering and becoming tenant. It seems entirely analogous to *Morgan v. Griffith* ⁽¹⁾, which I think well decided. Our decision apparently conflicts with that in *Cocking v. Ward* ⁽²⁾ and *Mechelen v. Wallace* ⁽³⁾. But it is to be observed that in *Cocking v. Ward* ⁽²⁾ the court construed the agreement as an agreement for the surrender of the premises, and therefore one clearly within the Statute of Frauds. Whether they were right in that is not the question; but so [179] it was construed that the plaintiff *had bound himself to surrender the premises to the defendant, and therefore entered into a contract that was void for not being in writing. I cannot agree, that on the statements in this declaration, there was any agreement, that the one bound himself to let, and the other to take; and all the defendant is alleged to have said is: "If you become tenant I will repair the house and bring in the furniture." This is certainly not a contract or sale of any interest in or concerning land.

ARCHIBALD, J.: I am entirely of the same opinion. I quite agree, if any part of the contract sued upon was an agreement for an interest in or concerning land, it would be within the Statute of Frauds and require to be in writing; but it seems to me the substance of the contract as set out in the declaration is: "If you choose hereafter to become tenant, I now agree I will do the repairs and send in the furniture." There is no contract binding the plaintiff to become tenant at all. It is only in the event of his doing that on which the stipulation to do repairs and send in the furniture depends, that the promise becomes binding. Although that involves the entering into the agreement for a tenancy, yet it does not involve any agreement relating to an interest in and concerning land at a time when the promise that is the subject of this action is entered into. It is left entirely voluntary on the part of the plaintiff to become tenant or not, and though when he does become tenant the defendant

⁽¹⁾ Law Rep., 6 Ex., 70.

⁽²⁾ 1 C. B., 858; 15 L. J. (C.P.), 245.

⁽³⁾ 7 Ad. & E., 49.

is bound to do the repairs and send in the furniture, that is collateral to any interest in land; and I think, for these reasons, the agreement does not require to be in writing.

Judgment for the plaintiff.

Attorney for plaintiff: *John Pullen.*

Attorney for defendant: *G. Thompson Powell.*

See note 2 Eng. Rep., 315; *Ridgway v. Wharton*, 6 House of Lords Cases, 238; Story on Sales, § 222.

The principal case seems to turn upon the well settled rule that although a portion of the contract between the parties be reduced to writing, parol evidence is admissible to show a collateral agreement between them at the same time relating to a distinct matter, not embraced within the terms of the written contract, if the part resting on parol be not required to be in writing: *Hope v. Smith*, 35 N. Y. Supr. Court Rep., 458; *Hope v. Balen*, 58 N. Y. Rep., 380; *Potter v. Hopkins*, 25 Wend., 417; *Barker v. Bradley*, 42 N. Y., 316; *Hutchins v. Hebbard*, 84 N. Y., 24; *Johnson v. Hathorne*, 2 Abbott's Court App. Dec., 465, 8 Keyes, 126; *Morris v. Whitcher*, 20 N. Y., 41; *Silliman v. Tuttle*, 45 Barb. 171; *Colburn v. Lansing*, 46 Barb. 37, 42; *Batterman v. Pierce*, 8 Hill, 171; *Buckley v. Bentley*, 48 Barb., 287; 1 Greenleaf's Ev., § 234 a; *Wilbeck v. Waine*, 16 N. Y., 532; *Wright v. Weeks*, 25 N. Y., 156; *Hotchkiss v. Mosher*, 48 N. Y., 478; *Carter v. Hamilton*, 6 Selden's Notes, April, 1854, page 80, reversing 11 Barb., 147; *Tibbets v. Ayer*, Lator's Supplement, 174; *Dunning v. Pratt*, 4 Duer, 331; *Newcomb v. Wallace*, 112 Mass., 25; *Farrar v. Smith*, 64 Maine, 74; *Bennett v. Tregent*, 24 Upper Canada C. P., 565; *Almgren v. Dutill*, 5 N. Y., 28, 53; *Boynston v. Boynston*, 25 How. Prac., 492, affirmed 41 N. Y., 619; *Weaver v. Fletcher*, 27 Ark., 510; 2 Parsons on Cont. (6th ed.), 492, note b, 553; *Miller v. Fitchthorne*, 81 Penn. St. Rep., 252; *Murray v. Smith*, 1 Duer, 412; *Thomas v. Dickinson*, 12 N. Y., 364; *Koop v. Handy*, 41 Barb., 454; *Ely v. McKnight*, 30 How. Prac., 97; *Willis v. Hubert*, 117 Mass., 151; *Fusting v. Sullivan*, 41 Maryland, 168; *Carrihy v. Brock*, Irish Rep., 5 Com. Law, 501.

See however, *Detroit, etc., v. Forbes*, 30 Mich., 166.

Though parol evidence of the negotiations which led to the making of a contract is not admissible: *Thorp v. Ross*, 4 Abb. Court App. Dec., 416; *Renard v. Sampson*, 12 N. Y., 561; *Thomas v. Hunt*, 8 Transcript App., 191, S. C., 4 Abb. Court App. Dec., 416 note.

And a promisee may recover on a covenant fraudulently omitted from the written agreement between the parties: *McAboy v. Johns*, 70 Penn. St. Rep., 9.

It is a question of fact for the jury whether the entire contract was intended to be reduced to writing: *Stockwell v. Holmes*, 33 N. Y., 53-4.

So parol evidence is admissible to show that a sale according to custom is by sample: *O'Neill v. Bell*, Irish Rep., 2 Com. Law, 68.

In *Carter v. Hamilton*, Selden's Notes, April, 1854, p. 80, "An executor sold a field of wheat, supposing it to belong to him, but which proved afterwards to belong to the widow of the testator. The wheat was called 105 acres, but was sold subject to measurement. The purchaser gave his note for the wheat, estimating it at 105 acres. The widow, on being apprised of her rights, agreed with the executor, instead of asserting her claim to the wheat, to permit the sale to stand, and to accept the note of the purchaser in lieu of the wheat. She was not informed at the time of the sale, or at the time of taking the note, that the wheat was sold subject to measurement, but she had been told by the executor that the purchaser so claimed.

Upon measurement the wheat fell short, and the purchaser thereupon paid to the widow the amount of the note, deducting for the deficiency; she, however, insisted upon the payment of the whole, and brought this suit to recover the balance.

1875

Angell v. Duke.

Held, that she could not recover; that by consenting to adopt the sale she became bound by its terms; that as against the executor, the purchaser had a clear right to deduct for the deficiency in the quantity of wheat, on the ground of a failure *pro tanto* of the consideration of the note; and that he could not be deprived of this right by the transfer of the note to the plaintiff."

See also *Stacy v. Kemp*, 97 Mass., 166.

In an action on a note it was pleaded as a defence that the note was given for a sewing machine received by defendant on trial, and to be by him returned in case it failed to work well; *Held* that the defence pleaded did not seek to vary or contradict the note: *Farrar v. Mattheus*, 37 Iowa, 418; *Folger v. Donnan*, 37 Wisconsin, 619.

Where the amounts stated in the body of a note vary from the figures in the margin, parol evidence is not admissible to show that the sum intended was that stated in the margin, instead of that in the body: *Wolfolk v. Bank, etc.*, 10 Bush, Ky., 504.

Where the agreement to pay for musical services was by letter, held that parol evidence of a conversation between the parties prior to the signing of the first letter in which the plaintiff stated that the letter was not according to their previous talk, and that he did not mean to run any risk, to which defendant replied, "If everything fails, I will make the committee pay you," was not competent to control or vary the letter: *Zerraher v. Ditson*, 117 Mass., 553.

But when the tenant's agreement is in writing the presumption is that the covenants of the landlord is also in writing, and parol evidence of an agreement by the landlord to repair is not admissible until it be shown that his agreement was not reduced to writing: *Mayor v. Moller*, 1 Hilton, 491.

Although one who objects that an instrument is in writing and cannot be varied by parol evidence, cannot assume it was in writing without proof or a presumption to that effect: *Boynton v. Boynton*, 25 How. Prac., 493.

Parol evidence to contradict the record of a town meeting is not admissible, or of any record until corrected: *People v. Zeist*, 23 N. Y., 140.

Even though the record have been amended by the clerk: *Halleck v. Boylston*, 117 Mass., 469.

So parol evidence of the satisfaction of a mortgage or judgment is inadmissible: *Laing v. Titus*, 18 Abb. Prac., 388.

Nor to show a record—as an indictment—or that the party has been indicted: *Peck v. Yorks*, 47 Barb., 131; *Newcomb v. Griswold*, 24 N. Y., 298; *Rathbun v. Ross*, 46 Barb., 127.

But parol evidence is admissible to show that a witness has been an inmate of a state prison: *People v. Real*, 42 N. Y., 270, affirming 55 Barb., 551, and disapproving S. C., 55 Barb. 186; *Brandon v. People*, 42 N. Y. 268; *Russell v. St. Nicholas, etc.*, 51 N. Y., 643; *Tift v. Moor*, 59 Barb., 619.

Rathbun v. Ross, 46 Barb., 127, is not good law on this point, nor the case of *People v. Labeau*, 33 How. Prac., 75.

So to add to the examination of a party before a magistrate though taken in writing: *Venofra v. Johnson*, 1 Moody & Robinson, 316.

The day a trial took place is matter of record and cannot be proved by parol: *Thomas v. Anseley*, 6 Espinasse, 80.

The proceedings of the common council of a city can only appear by resolution or written proceedings, and parol proof of the passage of a resolution thereof is inadmissible. The records cannot be contradicted or supplemented by parol evidence. Where the law requires such records to be kept, they are the only lawful evidence of the action to which they refer: *Stevenson v. Bay City*, 26 Michigan, 44; *Gilbert v. City of New Haven*, 40 Conn., 102; *Moser v. White*, 29 Michigan, 59.

So as to the doings of the directors of a corporation: *Walrath v. Campbell*, 28 Michigan, 111.

In an action against a telegraph company for damages for failure to transmit a dispatch, the original dispatch delivered to the operator must be given in evidence, or if not its absence must be properly accounted for before secondary evidence thereof can be given: *Western Union, etc., v. Hopkins*, 49 Ind., 224.

Parol evidence is inadmissible to show words in general use were used in any except the ordinary sense: *Trustees, etc., v. Brooklyn, etc.*, 23

How. Prac., 448, affirmed 28 N. Y., 153; *Ehle v. Chittenango, etc.*, 24 N. Y., 548; *Scott v. Central, etc.*, 52 Barb., 45; *Hulbert v. Carver*, 87 Barb., 62, S. C., 40 Barb., 245; *Neff v. Freedman*, 2 Sweeney, 607; *Pholski v. Mutual, etc.*, 36 N. Y. Superior Court Rep., 234.

See *Reynolds v. Commerce, etc.*, 47 N. Y., 597.

Otherwise as to technical words or words which have acquired a peculiar meaning in a particular business—as to provisions in specifications for building engines, gas fixtures, etc.: *Cohell v. Lawrence*, 38 Barb., 648, affirmed 38 N. Y., 71; Note 5, Am. Rep., 241; *Pollen v. Le Roy*, 30 N. Y., 550, affirming 10 Bosw., 38; *Downs v. Sprague*, 1 Abb. Court of Appeals Dec., 550, 2 Keyes, 57.

So as to particular brand of lead, as "P. W. & P.:" *Pollen v. Le Roy*, 30 N. Y., 550.

Parol evidence is not admissible to show that a bond and mortgage conditioned for the payment of money absolutely, were not to be paid unless the mortgagee and two other persons to whom he furnished materials, fulfilled a contract of the latter for executing the stone work of certain houses which the mortgagor was erecting: there being no fraud or mistake, surprise or accident in the case: *Russell v. Kinney*, 2 N. Y. Leg. Obs., 238; S. C., 1 Sandf. Chy., 34; *McKinster v. Babcock*, 37 Barb., 265.

See *Thomas v. Truscott*, 53 Barb., 200; *Henshaw v. Dutton*, 59 Missouri, 139; *McDougall v. Field*, Irish R., 6 C. L., 185; *Folger v. Dousman*, 37 Wisconsin, 619.

In an action on a promissory note parol evidence is not admissible to show that at a settlement of accounts between the parties, upon which settlement the note was given, the plaintiff agreed to give it up unless he could find a receipt from the defendant for the payment of some property which the defendant had let him have, the parties differing whether the same had been paid for: *Brown v. Hall*, 1 Denio, 400.

See also *Jones v. Heliger*, 36 Wisc., 149; *Henderson v. Thompson*, 52 Geo., 149; *Folger v. Dousman*, 37 Wisc., 609.

So that it was agreed the maker

should not be called upon until certain securities were exhausted: *Abrey v. Cruz*, L. R., 5 C. P., 37; *Jones v. Heliger*, 36 Wisc., 149; *McDougall v. Field*, Irish R., 6 C. L., 185.

But see *Folger v. Dousman*, 37 Wisc., 619.

But a parol executed agreement made at the giving of a note is admissible: *Van Valkenburgh v. Stuppelbeen*, 49 Barb., 99.

Parol evidence that the payee of a note agreed to renew it is inadmissible: *Bailey v. Lane*, 18 Abb., 354, 21 How. Prac., 475; *Elizabeth Port, etc.*, v. Campbell, 18 Abb. Prac., 87; *Kellogg v. Olmstead*, 28 Barb., 90, 25 N. Y. Rep., 189.

It has been held that one who purchases land which is under incumbrance, and receives a conveyance without covenants, cannot set up a concurrent agreement by parol on the part of the grantor to pay off the incumbrances. Such agreement is parcel of an entire agreement for the sale of lands, and to be valid must be in writing: *Duncan v. Blair*, 5 Denio, 196; but the soundness of this case may, under the principles above laid down, be doubted.

Although the covenants in a deed contain no exception as to taxes, the grantor may show by parol that the grantee agreed, as a part of the consideration, to pay them: *Dearborn v. Morse*, 59 Maine, 210.

Where, however, the legal effect of a transfer is to render the vendee liable for a debt, such evidence is not admissible, as where one takes an assignment of a lease, he takes subject to accruing rent and cannot show by parol that the assignor agreed to pay such rent: *Graves v. Porter*, 11 Barb., 592.

See *Adams v. Hull*, 2 Denio, 306.

So where the grantor covenants against incumbrances parol evidence is not admissible to show that certain known incumbrances, were excluded from the covenant: *Long v. Moler*, 5 Ohio St. R., 271; *Hunt v. Amidon*, 4 Hill, 845.

But evidence that the amount of certain taxes was deducted from the consideration and the grantee agreed to pay them is admissible: *Newcomb v. Wallace*, 112 Mass., 25.

So that the insured agreed to discon-

1875

Angell v. Duke.

tinue the use of a fire place and to use a stove: *Alston v. Mechanics, etc.*, 4 Hill, 329; *Mayor v. Brooklyn, etc.*, 3 Abb. Ct. App. Dec., 251.

It is not competent to show by parol that real estate conveyed to two as tenants in common, is partnership property: *Lefevres Appeal*, 69 Penn. St. R., 122.

If a written receipt or agreement clearly show a sale, parol evidence that a bailment was intended is inadmissible: *Peck v. Armstrong*, 38 Barb., 215.

So in any case where the contract is clear and express, whether by letter or otherwise: *Forbes v. Waller*, 25 N. Y., 439; *Hosley v. Black*, 28 N. Y., 438, 26 How. Prac., 97; *Mallory v. Toga, etc.*, 36 How. Prac., 202; *Rice v. Forsyth*, 41 Maryland, 389.

But see *Wooster v. Sherwood*, 25 N. Y., 278; *Gillett v. Roberts*, 57 N. Y. Rep., 28.

The printed particulars under which a sale by auction proceeds, cannot be varied by parol evidence of a verbal statement by the auctioneer at the time of the sale, either as to the parcels or quality of the subject matter of sale: *Shelton v. Livius*, 2 Crompton & Jervis, 411, and note 417, Johnson's Am. ed., 2 Tyrwh., 420.

Although it is always competent for a party to show the instrument was not intended to become operative as a contract, and that they did not intend it as such: *Rogers v. Hadley*, 2 Hurl. & Colt., 227; *Earle v. Rice*, 111 Mass., 17; *Grierson v. Mason*, 60 N. Y., 394; *Bookstacer v. Jayne*, 60 N. Y., 146.

Under a contract to deliver 25,000 brick for \$3 per M. cash, parol evidence is not admissible to show the parties intended that payment should be made for each parcel of brick as they should be delivered: *Baker v. Higgins*, 21 N. Y., 397; *Husted v. Craig*, 36 N. Y., 221.

But see *Patridge v. Gildermeister*, 3 Abb. Ct. App. Dec., 461, 1 Keyes, 98.

So where to deliver thousand tons bark per year, no ambiguity, parol testimony is inadmissible to show to deliver within less than a year: *Curtiss v. Howell*, 39 N. Y., 211.

And it is not competent to show by parol that a portion of the contract price was to be paid in consideration of delivery of part of the articles before the time specified: *Brady v. Oustter*, 3 Hurl. & Colt., 112.

Where one party agreed to pay a particular sum by an order on "A" parol evidence that the order was to be payable in merchandise is admissible: *Linneinan v. Rosenback*, 39 N. Y., 98.

So it is admissible to show that part of a broker's bought and sold note was a mere memorandum of the terms of employment of the brokers, and not a part of the contract of sale: *Kempson v. Boyle*, 3 Hurl. & Colt., 763.

Parol evidence to explain an imperfectly worded written contract, even where some parts of it were difficult to be understood alone, is not admissible; and that, though the chief question in the cause was the nature of the contract which had been rendered doubtful, by partial and incomplete alteration, and which therefore seemed to require to be supplied and perfected by some such additional words as the evidence rejected would have furnished; and although it contained dubious words, involving it in uncertainty as to whether it purported to be a sale of particular merchandise to arrive by a certain vessel, or of such merchandise generally, whenever the contracting party should receive sufficient to supply the purchaser with the quantity: *Halliley v. Nicholson*, 1 Price, 404; but see *Allen v. Coit*, 6 Hill, 318.

A builder bought lumber of the plaintiff to be used in erecting a house for the defendant, and gave therefor a draft drawn on the defendant and accepted by him "payable when the house is ready for occupancy." Held, in an action brought on the draft after the house was finished, that evidence that the builder did not use the lumber in erecting the house, and did not finish the house, and that the defendant had to finish it himself was inadmissible: *Cook v. Wolfendale*, 105 Mass., 401.

Where an executrix held a mortgage given to her as securities for moneys due and coming due under her husband's will, and it was treated by her and the heirs as her personal property, which mortgage she assigned and executed personally without consideration to her daughter, the defendant; Held, in supplementary proceedings against the executrix subsequently, that oral proof should not change the legal effect of the assignment thus made, by claiming that it was held in trust by the executrix for her husband's estate, al-

though it was assigned personally by her: *Muller v. Hall*, 49 How Prac. Rep., 374.

It is competent to prove a verbal agreement made subsequent to a written agreement, which varies the written agreement, though made on the same occasion and before the parties separate, where the written agreement contemplates a supplementary contract, and the verbal agreement is consistent with what the written agreement contemplates might thereafter transpire between the parties to supply what the written contract expressly left open for future agreement: *Field v. Mann*, 42 Vermont, 61.

So a waiver by an indorsee of protest of a note: *Bryant v. Wilcox*, 49 Cal., 47.

In construing a written instrument capable of two meanings, parol evidence of the antecedent and surrounding facts and circumstances is admissible to ascertain its meaning: *Dent v. North, etc.*, 49 N. Y. 390; *Ins. Co. v. Lyman*, 15 Wallace, 664, but see comments on this case, 9 Eng. Rep. 361, note; *Blossom v. Griffin*, 13 N. Y., 569; *Mayor v. Exchange, etc.*, 3 Abb. Ct. Appeals Dec., 261, 265; *Ferly v. Waller*, 25 N. Y., 439; *Reynolds v. Commerce, etc.*, 47 N. Y., 597; Note 5 Am. Rep., 241; *Chambers v. Reilly*, Irish Rep. 7 Com. L., 231.

But not previous conversations or negotiations: *Peck v. Armstrong*, 38 Barb., 215; *Colwell v. Lawrence*, 38 N. Y., 71; Note 5 Am. Rep., 241; *Coons v. Chambers*, 1 Abb. Prac., 165, 1 Abb. Ct. App. Dec., 439; *Pollen v. Le Roy*, 30 N. Y., 550; *Duel v. North, etc.*, 49 N. Y., 390; *Kempster v. Bank*, 32 Upper Canada Q.B., 87; *Sandford v. Newark, etc.*, 39 New Jersey Law, 1.

So if the entries in a book account are obscure, parol evidence of what is meant is admissible: *Allen v. Coit*, 6 Hill, 318; Note 5 Am. Rep., 241.

But see *Halliley v. Nicholson*, 1 Price, 404.

So where a contract is capable of two constructions, one legal and one illegal, parol evidence is admissible to determine the intention of the parties: *Brown v. Brown*, 34 Barb., 533; *Earl v. Clute*, 2 Abb. Court Appeals Dec., 1.

Otherwise where an illegal consideration clearly appears from the agreement: *Porter v. Havens*, 37 Barb., 343.

But though a lease contain a covenant that no illegal use shall be made of the property, parol evidence that the property was let for an illegal purpose is admissible: *Sherman v. Wilder*, 106 Mass., 537.

So such evidence is admissible when the contract is capable of two constructions: *Eaton v. Alger*, 2 Abb. Court App. Dec., 5, 2 Keyes, 41; S. C. on second appeal, 47 N. Y., 345, affirming 57 Barb., 179.

Proof of a parol agreement between indorsers at the time of indorsing the note that in case they were compelled to pay anything upon the note, they should be jointly liable, is admissible: *Ross v. Eepy*, 66 Penn. St. Rep., 481, 5 Am. Rep., 394.

So proof that after payment of a note, the holder at the request of one who paid it as agent of the indorsers, indorsed it as evidence of payment and not as indorsers, is admissible: *Morris v. Faurot*, 21 Ohio St. Rep., 155.

In an action on an agreement, by which in consideration of the plaintiff giving defendant his promissory note for \$438, payable four months after date, as the purchase money for a note of \$730, made by T. & Son, having then ten months to run, payable to defendant's order—defendant agreed to keep the plaintiff's note renewed until the maturity of T. & Son's note; and at the maturity of T. & Son's note "to procure the said T. & Son to renew their said \$730 note, by giving their seven promissory notes for equal amounts payable to my order, and payable in one, two and three months," etc. Held, that the words "payable to my order" did not necessarily import an unconditional indorsement by defendant of the seven notes, but might mean only such an indorsement as would pass the property in them to the plaintiff; that evidence of conversations between the parties before making the agreement, and of the surrounding circumstances, was therefore admissible to show its true meaning: and it appearing that the note for \$730, also payable to defendant's order, was indorsed by defendant "without recourse," and that the plaintiff designedly left the agreement doubtful, so as to insist upon an unconditional indorsement as to the others; held, that he could claim only

1875

Angell v. Duke.

that these notes should be indorsed as the first one was: *McCarthy v. Vine*, 22 Upper Canada Common Pleas, 458.

So in an action against indorser of a note parol evidence is admissible to show that he indorsed such note for the purpose of transferring title only, and upon an agreement with plaintiff that he should not be held liable thereon: *Bruce v. Wright*, 5 N. Y. Supreme Ct. Rep., 81, S. C. less fully, 3 Hun, 548. But it seems to us such agreement should be set up as an equitable defence and a reformation of the contract demanded, as parol evidence is no more admissible to contradict what is implied from a written contract than to contradict its express conditions: *Norton v. Coons*, 6 N. Y. Rep., 33; *Bank v. Smith*, 27 Barb., 489; *Dale v. Geer*, 38 Conn., 15; on second appeal, 39 Conn., 89; *Graves v. Porter*, 11 Barb., 592; *Milk v. Christie*, 1 Hill, 102; *Pattison v. Hull*, 9 Cowen, 747; *First National, etc., v. National, etc.*, 20 Minn., 63; *Beattie v. Brown*, 64 Illinois, 360; *Taunton Bank v. Richards*, 5 Pickering, 436; *Jones v. Heiliger*, 36 Wisc., 149.

But see 9 Eng. Rep., 15-16, note; *Ross v. Eppy*, 66 Penn. St. Rep., 481; *Mendenhall v. Davis*, 72 N. C., 150.

Including an agreement to waive protest: *Buckley v. Bentley*, 42 Barb., 648; S. C. second appeal, 48 Barb., 283.

See *Porter v. Kimball*, 53 Barb., 467, where waiver was of "demand," which rendered notice impossible; also *Harrington v. Dorr*, 3 Rob., 275; *Marsh v. Waterman*, 21 Louisiana Ann., 377; *O'Leary v. Martin*, Id., 389.

Though if not express and written, waiver may be implied from acts of the party: *Sheldon v. Horton*, 43 N. Y., 93, affirming 53 Barb., 23; *Tucker v. Fairbanks*, 98 Mass., 101.

But see *Hazelton v. Colburn*, 1 Robertson, 845; *Coughlan v. Dinmore*, 9 Bosworth, 454; *Pickin v. Graham*, 1 Crompton & Meeson, 725, 730 note, Johnson's ed.; S. C. 3 Tyrwh., 923; *Bryant v. Wilcox*, 49 Cal., 47.

Where a woman who was sole legatee of her husband, indorsed certain notes belonging to his estate, signing her name as "sole legatee," and it appeared that she was very old and ignorant of business, understanding English very imperfectly, could not read what

had been written, and signed her name by cross mark, and the purchaser relied upon his own information and judgment, held that the widow was not estopped from denying that she had any title to the note: *Stagg v. Linnenfeller*, 59 Missouri, 336.

Where a deed runs "thence westerly to a road" it carries the grantee to the center thereof, and parol evidence that the parties did not so intend is inadmissible: *Goodenow v. Hutchinson*, 54 N. H., 159.

Parol evidence is admissible in a court of equity to show that a deed, absolute on its face, was intended as a mortgage—as security for a particular debt: *Despard v. Wadbridge*, 15 N. Y., 374; *Smith v. Beattie*, 31 N. Y., 542; *Barrett v. Carter*, 3 Lans., 70; *Roach v. Cosine*, 9 Wend., 226; *Walton v. Cronly*, 14 Wend., 63; *Chester v. Bank*, 16 N. Y., 343; *Hoges v. Tennessee*, 8 N. Y., 416; *Birbeck v. Tucker*, 2 Hall, 121; *Van Dusen v. Worral*, 5 Abb. Prac., N. S., 288; *McBurney v. Wellman*, 42 Barb., 390, affirmed 43 How. Prac., 427; 1 Trans. App., 224, 36 How., 286; *Rosboro v. Peck*, 48 Barb., 92, 95; *Marvin v. Prentice*, 49 How. Prac., 385; *Swart v. Service*, 21 Wend., 36; *Regney v. Tallmadge*, 17 How., 556; *Littlewort v. Davis*, 50 Miss., 403.

But this only to show that the deed was intended as a mortgage: *Cook v. Eaton*, 16 Barb., 439; *Taylor v. Baldwin*, 10 Barb., 582, Id. 626; *Barrett v. Carter*, 3 Lansing, 70; *Sturtevant v. Sturtevant*, 20 N. Y., 40; *Webb v. Rice*, 6 Hill, 219, reversing 1 Hill, 606.

The evidence should however be clear and explicit: *Plumer v. Guthrie*, 76 Penn. St., 441.

So it may be shown that a chattel mortgage which on its face secures the payment of a particular sum of money, was given to secure the payment of a note signed as surety for the mortgagor by the mortgagee: *McKinster v. Babcock*, 26 N. Y., 378; *Chester v. Bank*, 16 N. Y., 336.

Or that a note was given as collateral to the payment of interest on a mortgage: *Nichols v. Smith*, 42 Barb., 381.

But the rule that parol evidence is admissible to show a deed was intended as a mortgage, does not apply to an official conveyance: *Ryan v. Dox*, 25 Barb., 440.

It is competent to establish by parol evidence the fact that a sale was in reality made to one person, although the bill of sale given by the seller shows a sale to another: *MacArthur v. Soule*, 5 Hun, 63.

So to show a partnership, though there be written articles of association, unless the question at issue be a question of construction of the instrument, i. e., as to whether it be a contract of partnership or of agency merely: *Price v. Hunt*, 59 Missouri, 258.

In an action between the parties to an agreement in writing for the purchase of oaks growing on certain lands, "together with all other trees growing through the oak plantations and mixed with the oak," the question in dispute being what trees beside oaks were included in the agreement: Held, that evidence of conversations between the parties in reference to the sale, prior to the agreement, was properly received in order to identify the subject matter of the contract: *Chambers v. Kelly*, Ir. Rep., 7 C. L., 231.

So where a paper is delivered as a mere receipt or memorandum, parol evidence of the terms of the sale is admissible: *Filkins v. Whyland*, 24 Barb., 379, 24 N. Y., 338; *Atwater v. Clancy*, 107 Mass., 369; *Terry v. Wheeler*, 25 N. Y., 523; *Burwell v. Poineer*, 37 N. Y., 312; *Stacy v. Kemp*, 97 Mass., 168; *McCotter v. Hooker*, 8 N. Y., 497; *McDougall v. Cooper*, 31 N. Y., 498; *Baker v. Fawkes*, 35 U. C., Q. B., 302.

And unless a complete contract of sale, parol evidence of a warranty is admissible: *Koop v. Handy*, 41 Barb., 454, disapproving *Horner v. —*, 15 C. B., 667, 80 Eng. Com. L.

See 1 Pars. on Cont. (6th ed.), 547, note v; *Rice v. Forsyth*, 41 Maryland, 389.

Otherwise where the instrument is made to evidence the terms of sale by specifying the species, quantity and quality of the several articles with the prices, and on its face declares a sale of the property, or as embodying a contract of sale or other agreement: *Bone-steel v. Fluck*, 41 Barb., 435, 37 How. Prac., 310; *Coon v. Knapp*, 8 N. Y. Rep., 402; *Eggleston v. Knickerbocker*, 6 Barb., 458; *Terry v. Wheeler*, 25 N. Y. Rep., 523; *Kellogg v. Richards*, 14 Wend., 116; *McCarty v. Edwards*, 24

How. Prac. 245, 3 Albany Law Jour., 499; *Halliday v. Hart*, 30 N. Y., 474.

See *Lee v. Lancashire, etc.*, L. R., 6 Chy. App., 527.

A receipt in full, showing a settlement of damages for an injury, may be avoided for fraud: *Michigan, etc.*, v. *Dunham*, 30 Mich., 128.

So as to the agreement portion of a bill of lading: *Fitzhugh v. Wiman*, 9 N. Y., 559.

But see *Meyer v. Peck*, 33 Barb., 532, affirmed 28 N. Y., 590; *Idé v. Sadler*, 18 Barb., 32; *McCotter v. Hooker*, 8 N. Y., 497.

When a bill of lading provided that the carrier should transport the property to its depot at Chicago and was silent as to what should be then done with it, parol evidence of a practice to deliver such goods to the next carrier is admissible: *Hooper v. Chicago, etc.*, 27 Wisc., 81.

After a parol agreement for the sale of goods, to be delivered by successive consignments at a specified price, had been entered into, a memorandum in writing of the bargain, but omitting the price, was made and signed by the agent of the sellers; and several of the consignments were delivered, accepted and paid for at the price agreed upon: Held, in an action for non-delivery of the remaining consignments, that the memorandum was merely an admission of a contract of which there had been part performance, and that parol evidence was admissible to prove the price: *Jeffcott v. North, etc.*, Irish Rep., 8 C. L., 17.

A party may show by parol that the growing crops were reserved on a sale of the land, although there be no exception in the deed. A parol reservation of the growing crops is a severance, and will prevent them from passing as realty under an orphan's court sale of the premises. Such reservation need not be in writing; it is not an interest on land. Such a reservation gives the seller a right to enter and cut the crops: *Backenstoss v. Stahler*, 33 Penn. St., 251; *Baker v. Jordan*, 3 Ohio State R., 488; *Heavilon v. Heavilon*, 29 Ind., 509.

So a parol reservation of the manure on a farm is valid: *Strong v. Doyle*, 110 Mass., 92.

So in regard to a lease of land: *Yomans v. Caldwell*, 4 Ohio St. R., 71.

It is otherwise, however, in respect to its fixtures, natural products, as trees, &c.; in regard to which a reservation must be in writing: *Backenstoss v. Stahler*, 33 Penn. St., 251; *Bank v. Orary*, 1 Barb., 542; *Slocum v. Seymour*, 36 New Jersey Law, 188; *Sterling v. Baldwin*, 42 Vermont, 306; *Johnson v. Moore*, 28 Mich., 3; *Jones v. Timmons*, 21 Ohio St. Rep., 596; *Detroit, etc., v. Forbes*, 30 Mich., 166.

A reservation of such must be with all the formalities of a conveyance of real estate: *Vorbeck v. Roe*, 50 Barb., 302; *Goodyear v. Vosburgh*, 39 How., 377, 57 Barb., 243.

But see *Carpenter v. Opley*, 2 Lansing, 451; *Harris v. Frink*, 49 N.Y., 24, reversing 2 Lans., 35; *Lawrence v. Erington*, 21 Grant's Chy., 261.

And must be recorded except as against a purchaser with notice: *Vorbeck v. Roe*, 50 Barb., 306; *Warren v. Leland*, 2 Barb., 613; *Goodyear v. Vosburgh*, 39 How. Prac., 377, 57 Barb., 243; *Driscoll v. Marshall*, 15 Gray, 62; *Sterling v. Baldwin*, 42 Vermont, 306; *Johnson v. Moore*, 28 Mich., 3.

One to whom trees have been conveyed in writing, has an interest in land for their growth and preservation, and may maintain trespass: *Narehood v. Wilhelm*, 69 Penn. St., 64; *Johnson v. Moore*, 28 Mich., 3.

Parol evidence of what a testator usually called "The Ashford Hall Estate," is admissible: *Recketts v. Turquand*, 1 House Lords Cas., 472.

So under an agreement to publish a card in an advertising chart to show what kind of chart promised to publish: *Stooper v. Smith*, 100 Mass., 63.

So where a will devised "all that part of the premises situated on the south-easterly corner of Elm and Mulberry streets, now occupied by him;" held the devisee took that part of the premises with all the rights and privileges in the yard, parcel of the premises, which he had held and occupied of right under and by virtue of his agreement with the testator, and that parol evidence was admissible to show the terms of such agreement, and the extent of the occupation by virtue of the contract: *Stanford v. Lyon*, 37 New Jersey Law Rep., 426.

Where a written acknowledgment of the validity of a demand does not describe or specify the demand to which

it refers, parol evidence of identity with that in suit is admissible to save the statute of limitations: *Rouze v. Thompson*, 15 Abb. Prac. Rep., 377; *McNamee v. Terney*, 41 Barb., 495.

Where a written memorandum that a note is left as "collateral security for all liability incurred by D. & H." in order to arrive at the intent of the parties, parol evidence is admissible to show that D. & H. had not then incurred any liability but that the memorandum referred to future liabilities: *Agwam Bank v. Strever*, 18 N. Y., 502; *Walrath v. Thompson*, 4 Hill, 200.

But see *Broom v. Batchelor*, 1 Hurl. & Norm., 255.

So in a receipt for property "which I agree to account for on demand." *Eaton v. Alger*, 2 Abb. Court App. Dec., 5, 2 Keyes, 41; S. C. on second appeal, 47 N. Y., 345, affirming 57 Barb., 179.

Parol evidence may be admitted to correct the description of property in a chattel mortgage where it is incorrect in some particulars only but correct in others: *Dodge v. Potter*, 18 Barb., 193.

So to show it was in fact at a different place than that stated in the mortgage: *Galen v. Brown*, 22 N. Y., 37.

So in a suit to reform a sheriff's deed to show that a sheriff at a sale of land expressly excepted certain lands from the sale: *Bartlett v. Judd*, 21 N. Y., 200.

But see *Duff v. Wynkoop*, 74 Penn. St. R., 300.

Otherwise where the question arises collaterally: *Bartlett v. Judd*, 21 N. Y., 202; *Jackson v. Roberts*, 7 Wend., 83; *Swick v. Sears*, 1 Hill, 17; *Duff v. Wynkoop*, 74 Penn. St. R., 300.

Parol evidence is not admissible to vary the description in a deed which clearly designates the piece of land conveyed: *Emerick v. Kohler*, 29 Barb., 165; *Wagh v. Wagh*, 28 N. Y., 94; *Vosburgh v. Teaton*, 32 N. Y., 561.

Otherwise where the description is vague and uncertain: *Petit v. Shepard*, 32 N. Y., 97.

But see *Purkiss v. Benson*, 28 Mich., 538, when not clearly designated.

In a written contract of sale parol evidence is admissible to show that a place of delivery was fixed: *Musselman v. Skinner*, 31 Penn. St. R., 265; *Esmond v. Van Benschoten*, 12 Barb. 360; *Davis v. Talcott*, 14 Barb., 611, reversed but on another point, 12 N. Y., 184.

Or a time: *Orguerre v. Luling*, 1 Hillton, 383.

So a parol extension of time for performance, of the terms of a contract, is valid: *Friess v. Rider*, 24 N. Y., 369; *Van Buskirk v. Stow*, 42 Barb., 9; *Ludwig v. Jersey, etc.*, 48 N. Y., 379; *Clarke v. Meigs*, 10 Bosw., 337.

But see *Kuhn v. Stevens*, 36 How Prac., 275; *Clough v. Murray*, 3 Robertson, 7; *French v. New*, 2 Abb. Court App. Dec., 209.

It has been held that where there were two usual routes for shipping property sold, parol evidence that it was agreed that it should be shipped by one of them, is admissible: *Webster v. Paul*, 10 Ohio St. R., 531; *White v. Ashton*, 51 N. Y., 280.

An agreement to engraft new terms upon an existing contract is not binding if without consideration: *Titus v. Cairo, etc.*, 37 New Jersey Law, 98.

Evidence of waiver of payment of the premium of a policy of insurance is not in contradiction of a clause that the policy shall be invalid until payment of the premium: *Bodine v. Exchange, etc.*, 51 N. Y., 117; *Sheldon v. Atlantic, etc.*, 26 N. Y., 460; *Boehm v. Ins. Co.*, 35 N. Y., 131; *Wood v. Poughkeepsie, etc.*, 32 N. Y., 619; *Goit v. Nat. Ins. Co.*, 25 Barb., 190; *Post v. Aetna*, 43 Barb., 368.

So of an usage that the insured might pay after the day named in the policy for payment, or that the insurers will give the assured notice of time for payment: *Hewitt v. Knickerbocker Ins. Co.*, 44 N. Y., 276, reversing 19 Abb., 217, 3 Rob., 232; *Worden v. Guardian, etc.*, 39 N. Y. Superior Court Rep., 317; *Trustees, etc., v. Brooklyn, etc.*, 19 N. Y., 805, 28 N. Y., 153; *Isaacs v. Royal, etc.*, L. R., 5 Excheq., 296.

But see *Wood v. Poughkeepsie, etc.*, 32 N. Y., 619.

So parol evidence is admissible of a mistake in fact and to rectify it or to show the parties contracted under a mistake of facts: *Rowboro v. Peck*, 48 Barb., 95; *McDougall v. Cooper*, 31 N. Y., 198; *Benjamin v. Hillard*, 23 How. U. S., 150; *Lee v. Adair*, 37 N. Y., 95; *McAhey v. Johns*, 70 Penn. St. R., 70.

So evidence to show fraud in an action to recover for the fraud, or in

which fraud becomes material, however solemn the instrument: *Sharp v. Mayor*, 25 How. Pr., 390, 40 Barb., 257; *Koop v. Handy*, 41 Barb., 454; *Forbes v. Waller*, 25 N. Y., 439.

Parol evidence of the waiver of a forfeiture of a policy of insurance or of a transfer thereof to a purchaser of the premises is admissible: *Pratt v. N. Y. Cent. Ins. Co.*, 55 N. Y., 505.

Notwithstanding a policy of insurance contains a warranty that the property is free from all liens, the insured may show by parol that the insurance was of owner's equity of redemption and that the insurer knew the property was subject to certain mortgages: *Bidwell v. North Western, etc.*, 24 N. Y., 302.

Parol evidence is admissible to contradict the date of a written instrument: *Draper v. Snow*, 20 N. Y., 331.

But where there was a blank "183-," parol evidence was held inadmissible to show the blank ought to have been filled with a "7": *Fuller v. Acker*, 1 Hill, 473. But we doubt the soundness of the case.

So to vary its consideration or to show what the real consideration was: *Adams v. Hull*, 2 Den., 306; *Walcott v. Ronalds*, 2 Robertson, 620; *Rowboro v. Peck*, 48 Barb., 95; *Stackpole v. Robbins*, 47 Barb., 212; *Barker v. Bradley*, 42 N. Y., 316; *Seaman v. Hasbrouck*, 35 Barb., 151; *Ely v. McKnight*, 30 How. Prac. Rep., 97.

Though it cannot be shown in order to defeat a deed that it was wholly without consideration. Where a consideration of one dollar is recited, it cannot be avoided by proof that the dollar was not paid as the covenantee may sue therefor: *Walcott v. Ronalds*, 2 Rob., 620; *Goit v. Nat. Prot. Ins. Co.*, 25 Barb., 190; *Stackpole v. Robbins*, 47 Barb., 212.

To show authority of an agent to execute a paper in controversy, evidence that he had executed similar papers with the principal's knowledge and assent, is admissible without producing such other papers: *Moss v. Averill*, 10 N. Y., 450.

So in order to show a combination between the witness and others against the party in opposition to whom he is called, though the agreement be in writing: *Klein v. Russell*, 19 Wallace, 433.

1875

Finlinson v. Porter.

Some cases hold that the rule that parol evidence is not admissible to vary or contradict a written agreement only applies to parties to it, and is not applicable to third persons: *Lee v. Adsit*, 37 N. Y., 95.

How much proof shall be required to show the loss of a paper so as to entitle the party to give parol evidence of its contents, is one of law for the court: *Durgin v. Danville*, 47 Vermont, 95.

[Law Reports, 10 Queen's Bench, 188.]

Jan. 22, 1875.

188]

*FINLINSON V. PORTER and Another.

Trespass—Grant of Drain—Power of Grantee to Deepen—Easement.

By indenture, executed by both parties, defendant conveyed to plaintiff in fee certain land, "subject, nevertheless, to the joint-ownership and right to the use by the defendant and the owners and occupiers for the time being, of certain adjoining land, as then enjoyed by him or them, but no further or otherwise, of the drain running through or laid in the land conveyed, and the course and direction, of which was delineated on a plan in the margin of the deed, and subject to the right of the defendant and the occupiers, &c., at all reasonable times to enter upon the land thereby conveyed for the purpose of repairing the drain and laying or replacing pipes therein."

The Local Board of Health, under s. 49 of 11 & 12 Vict. c. 63, after the above conveyance, constructed a new sewer (in lieu of the old one, into which the drain discharged the sewerage from the plaintiff's and defendant's premises), at a lower depth; and the defendant thereupon lowered the drain between two and three feet and put fresh pipes (but in the course of the old drain), in order to adapt it to the new sewer. Plaintiff having brought an action of trespass:

Held, that the effect of the deed, executed by both parties, was either to create a tenancy in common in the drain between the plaintiff and defendant, or only an easement in the defendant, but that, in either view, the defendant had done no more than he had the right to do.

CASE stated by order of Kelly, C.B., at the trial, a verdict being taken for the plaintiff, damages 40s. subject to such case.

The action was for an alleged injury to the plaintiff's reversionary interest in certain land, &c., situate at Bedford, by removing a drain, and substituting another drain at a lower level.

The following are the material parts of the case:

In August, 1864, William Jones was seised in fee of certain land and premises. By an indenture between Jones and the plaintiff, dated the 17th of August, 1864, and executed by both parties, Jones conveyed to the plaintiff in fee a certain [189] part of the land *and premises (hereinafter called the plaintiff's premises), "subject nevertheless to the joint ownership and right to the use, by the said William Jones, his heirs and assigns, and the owners and occupiers for the time being, of the said land and premises now belonging to the said William Jones as aforesaid, and adjoining the prem-

ises hereby conveyed (as at present enjoyed by him or them, but no further or otherwise), of the watercourse, drain, or sewer now running through, or laid in, or under, the said piece of land hereby conveyed, from the eastern to the western boundary of the same piece of land, as the same watercourse, drain, or sewer, the joint use whereof is hereby reserved, and the course and direction thereof are marked and delineated in the plan in the margin of these presents, and also subject to the right of the said William Jones, his heirs or assigns, or the owners or occupiers of the said land and premises now belonging to him as aforesaid, at all seasonable times to enter upon the said piece of land hereby conveyed for the purpose of repairing the said watercourse, drain, or sewer, and laying or replacing pipes therein."

William Jones, by his will of the 5th of September, 1868, devised and bequeathed all his real and personal estate to the use of the defendants, their heirs, executors, administrators, and assigns, upon certain trusts.

The Public Health Act (11 & 12 Vict. c. 63) was, at the date of the execution of the above deed, and still is, in force in the borough of Bedford, in which the property in question is situate.

There is and was at the time of the execution of the conveyance a main sewer belonging to the Local Board in River Street (which is at the east of the plaintiff's premises) into which the drain mentioned in the conveyance discharged the sewage from the plaintiff's and the defendants' premises, but at the date of the conveyance there was no such sewer in Gravel Lane.

In or about the month of December, 1864, the Local Board, in the due exercise of their powers, altered the system of the drainage of the borough of Bedford, and constructed a new main sewer in River Street to be used instead of the old sewer for sewage and other purposes at a level of 3 ft. 9 in. lower than the level of the old sewer. They also constructed a sewer in Gravel Lane, upon which the defendants' property abuts to the west.

*Shortly after the alteration of the sewer in River [190 Street and Gravel Lane, the plaintiff constructed a new drain at a greater distance from his house, and at a lower level than the old drain, and communicating with the new sewer in River Street, and afterwards and some time in the year 1871, the plaintiff was asked by Smith, the builder employed by the defendants, to allow the defendants to connect the new drain, which the defendants would be obliged to construct

1875

Finlinson v. Porter.

to drain their premises, with the new drain made by the plaintiff; this the plaintiff refused to permit.

On the 19th of January, 1872, the surveyor of the Local Board reported to them, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Local Government Act, 1858 (21 & 22 Vict. c. 98), that the defendants' cottages, part of the defendants' said premises, were without any drain communicating with a sewer as was sufficient for the proper and effectual drainage of the same and their appurtenances, and that a sewer belonging to the Local Board was within 100 feet of some part of each of such cottages, viz., of the front thereof, and that a covered drain of the following materials and size, that is to say, of a 6-inch glazed stoneware pipe from the sewer to the said cottages, and at a level of 5 feet deep, and with a fall of 1 in 25 ft. was necessary for the proper and effectual drainage of the same.

The said cottages of the defendants front upon Gravel Lane, and are within 9ft. 6 in. of the new sewer of the Local Board in Gravel Lane, but the closets from which the drain runs are about seventy feet from the new sewer in Gravel Lane. The backs of the cottages are within 100 feet of the new sewer of the Local Board in River Street.

On the 20th of March, 1872, the Local Board served upon each of the tenants of the defendants' cottages a notice requiring drains to be made in connection with a sewer of the Local Board.

These notices were duly forwarded to the defendants, who, in order to comply with the same, did the acts complained of in this action, as hereinafter described. When the above notices were sent by the surveyor he did not know of the existence of the drain, and the defendants having explained its situation to him, a plan of the drainage as then intended to be carried out was prepared and approved by the Local Board, and an order was given by the *surveyor to the defendant's builder, Smith, authorizing him to make the necessary connections with the sewers.

The defendants could have drained their houses and premises into the new sewers of the Local Board in either River Street or Gravel Lane, by means of drains constructed wholly in their own property; but they could not have drained into Gravel Lane without tunnelling under the houses, and they could not have drained into River Street without passing through property belonging to them, but let to a tenant from year to year.

The old drain was composed of unglazed earthenware pipes, of 9 in. diameter. Where the old drain entered the

plaintiff's premises it was at a depth of 3 ft. from the surface of the soil, and had a gradual and regular fall of $7\frac{1}{2}$ in. in 20 ft. to the point where it entered River Street, and at the latter point it was at a depth of 3 ft. 6 in. from the surface. The distance between the two points is 80 ft.

In the beginning of April, 1872, the defendants employed Smith to carry out the alterations of the old drain on the plaintiff's premises in accordance with the requirements of the Local Board, and thereupon Smith, by the defendants' directions, informed the surveyor to the Local Board of the time when he was about to commence the work, in order that he might be present to see the new drain connected with the sewer.

On the 10th of April Smith employed two men to do the last-mentioned work in the line of the old drain; and when they commenced the work the surveyor to the Local Board was present, and told Smith that the defendants would not be allowed by the Local Board to keep the level of the old drain, but must lower the level of the same. Smith and his men thereupon dug down to the old drain on the plaintiff's premises, and commenced removing the pipes thereof and laying new pipes composed of glazed stoneware pipes of 6 in. diameter, at a level of from 2 ft. to 2 ft. 6 in. below the old level. After they had constructed about 7 ft. of the drain so altered, they were seen by the plaintiff and his solicitors, who told Smith that they were trespassing and endangering the plaintiff's house, the drain being only 2 ft. 6 in. from the plaintiff's said house, and Smith then stopped the work.

On the morning of the 11th of April, Smith told the plaintiff *that he did not intend to continue the work, but in the [192 afternoon of the same day, having in the meantime been instructed by the defendants to complete the drain in accordance with the regulations of the Local Board, he put on an extra number of men and that day completed the drain. The drain so altered was for a part of its course through the plaintiff's land, at a level of from 2 ft. to 2 ft. 6 in. below the level of the old drain.

All the pipes of which the old drain was composed, and which were in good condition, were taken up, and others substituted by the defendants.

When the old drain was so altered, the land and premises of the plaintiff through which it was made were in the possession of Thomas Rust, as the plaintiff's tenant; and the reversion then belonged to the plaintiff; and the damages, it was agreed, should be 40s., if the plaintiff was entitled to a verdict.

At the time the drain was so altered and deepened the drain as it originally existed was in good repair, and did not require any repairs or any pipes laid or replaced in it, and was in every respect in a fit and proper condition to be used and enjoyed by the defendants or the tenants of their said land and premises as it was used and enjoyed at the date of the said conveyance by the then owners and occupiers of the said land and premises of the defendants; but, in consequence of the alterations in the sewers and the regulations of the Local Board, it could not be so used.

The court was to have power to draw inferences of fact.

The questions for the opinion of the court were:

1st. Whether the defendants were justified in entering upon the plaintiff's land and premises and digging therein, and opening the old drain and substituting new pipes therein.

2dly. Whether the defendants were justified in entering upon the said land and premises of the plaintiff and lowering the level of the existing drain for the purposes above mentioned.

Graham, for the plaintiff contended that, by the lowering of the public sewer, the defendants had lost whatever right of drainage they had through the plaintiff's premises. The drain was only granted as then enjoyed and no further nor otherwise. Lowering the level was making the drain further and otherwise.

[193] **Arbuthnot*, for the defendants, contended that the clause relied on for the plaintiff only went to confine the drain to the particular houses then built, and, as far as those houses were concerned, the defendants had a full right to keep up the drainage by adapting the drain to the new outfall.

MELLOR, J.: I am clearly of opinion that the defendants are entitled to the verdict. The contention of the plaintiff is quite untenable. He is in this dilemma: there is either a joint ownership between him and the defendants, and this would involve of course a right (which however is expressly granted) to do anything necessary to keep the drain in such a state as to be useful as a drain, in which case he can have no cause of action, on the facts, against the defendants. Or else the defendants have an easement with a similar right to enter and do all that is necessary, in which case also no action would lie. I think, even if there were not this joint ownership, and if the defendants only had an easement in the use of this drain, with power to enter, if necessary, to repair it and maintain it in an efficient state to drain the premises, that when the public authority comes and alters

the level of the sewer so as to render the drain useless without alteration, in this case also the defendants would be entitled to do what they have done. In either view, therefore, I am of opinion that the defendants are entitled to judgment.

LUSH, J.: This seems to me a very clear case. There is a drain used in common by houses on both parts of the property, and a conveyance was made by the owner, whom the defendants represent, to the plaintiff of that part of the property through which the drain runs, with this clause: [The learned judge read the clause.] This conveyance was executed by both parties. This clause, therefore, amounts to a grant by the plaintiff to the defendants of a tenancy in common in the drain. "As at present enjoyed but no further or otherwise," was intended to limit the user, so that the drain should not be used by any other premises. "As the same drain the direction whereof is described on the plan," that is, the defendants are not to alter the course of it, but keep it in the same line. Then at the end is added, "subject also *to the right of Jones and his heirs, &c., [194 to enter the land at all times for the purpose of repairing the drain and laying or replacing the pipes therein." Clearly the object of this latter clause was that the drain should be kept up as a drain for the use of the parties' respective houses, either party repairing it when necessary, and doing anything needful to keep it up in a state of efficiency. But even without this express right, I am of opinion that it would have been competent for the defendants to enter and make the drain of the requisite depth, and so connect it with the outfall into the sewer as altered and lowered by the public authority.

QUAIN, J.: I am of the same opinion. This appears to be a drain from two sets of premises to a public sewer. And by the conveyance the defendants had a right to drainage in a particular direction, as there was a joint ownership between the plaintiff and the defendants in the drain, in the course marked on a plan to the deed. After this conveyance the public authority lowered the level of the sewer, and in order to keep the drain in operation it became absolutely necessary to lower the drain, so as to accommodate it to the level of the sewer. Mr. Graham was obliged to contend that, by this alteration in the sewer, the defendants' right of drainage was gone. But that cannot be so. Suppose the defendants had had no other means of drainage, could it have been contended they had lost it? The defendants clearly had a right to have the drainage from their premises pass in a particular direction; and if by reason of the action of the public authority it becomes necessary that the drain should

1875

Finlinson v. Porter.

be lowered, then, either by virtue of the joint ownership in the drain, or by virtue of the clause in the conveyance as to the right to repair and relay the drain, the defendants had a right to keep up, as they have done, a sufficient drain. The clause "as at present enjoyed, but no further nor otherwise," does not apply to the then level of the drain, but to the then existing houses; and the drain was not to be employed to drain fresh-built houses which would impose a greater burthen on the plaintiff. The lowering of the level does not increase the burthen, the drainage is exactly the same, and the only effect is to keep up the drainage as it [195] was *enjoyed at the time of the conveyance. It is said that the alteration might injure the plaintiff's houses; the defendants would be bound to alter the drain in such a way as not to do any damage. It can be done, and must be so done. But no damage has been done, so that no such question arises. The defendants have done nothing but what they had a right to do; and are entitled to judgment.

Judgment for the defendants.

Attorneys for plaintiff: *Stokes, Saunders & Stokes.*

Attorneys for defendants: *Sharp & Ullithorne.*

Where the owner of land has, by any artificial arrangement, effected an advantage for one portion, to the burdening of the other, upon a severance of the ownership, the holders of the two portions take them respectively charged with the servitude and entitled to the benefit *openly and visibly* attached at the time of the conveyance of the portion first granted.

Accordingly, where the owner of land across which a stream flows has diverted it through an artificial channel, so as to relieve a portion of it formerly overflowed, which he then conveys, neither he nor his grantees of the residue can return the stream to its ancient bed to the damage of the first grantee.

Such benefits not naturally attached to the premises purchased, but previously conferred upon it at the expense of the other land of the grantor, do not depend upon covenant, but remain attached to the tenement conveyed, unless the right to subvert them is expressly reserved. The rule, which is general in its application to easements, which are continuous, *i. e.*, self-perpetuating independently of human intervention, as the flow

of a stream, is, it seems, restricted in the case of discontinuous easements to such as are absolutely necessary to the enjoyment of the property conveyed: *Lampman v. Milks*, 21 N.Y., 505; (see 4 Am. Law Review, 50); *Babcock v. Utter*, 1 Abbott's Court of Appeals Dec., 55, 1 Keyes, 427; *Beals v. Stewart*, 6 Lansing, 408; *Janes v. Jenkins*, 84 Maryland, 1, 5 Am. Law Times Rep., 111, 6 American Rep., 300; and note p. 306; *Curtiss v. Ayrault*, 47 N.Y., 73; *Voorhies v. Burchard*, 6 Lansing, 176; *Coolidge v. Hager*, 43 Vermont, 9; *Denton v. Laddell*, 23 New Jersey Eq., 64, affirmed 24 New Jersey Eq., 567; *Polden v. Bastard*, L. R., 1 Q. B., 156; *Cocheco Co. v. Whittier*, 10 N.H., 305; *Stackpole v. Curtis*, 32 Maine, 383; *Washb. Eas.*, 309-311 Marg. p.; *Hurd v. Curtis*, 7 Metc., 94; *Frey v. Witman*, 7 Penn. St., 440; *Crosby v. Bradbury*, 20 Maine, 61; *Gibson v. Brockway*, 8 N.H., 465; *Provost v. Calder*, 2 Wend., 517; *Oakley v. Stanley*, 15 Wendell, 523.

See the subject discussed, 4 American Law Review, 40-62, and also *Stevens v. Dennett*, 31 N. H., 324; see *Tabor v. Bradley*, 18 N. Y., 100, for an

exception to the rule, which case was commented upon in *Babcock v. Utter*, 1 Abbott's Court of Appeals Dec., 56, 1 Keyes, 427.

If the owner of property has acquired an easement upon lands of another, such easement will pass as an appurtenance to the dominant tenement: *Voorhies v. Burchard*, 6 Lansing, 176.

Otherwise if before conveyance he acquire title to the servient tenement also: *Scott v. Bentel*, 23 Gratt. (Va.), 1; *Whalley v. Thompson*, 1 Bos. & Puller, 371; but see *Thomas v. Thomas*, 2 Crompt., Mees. & Rosc., 84.

A right to support of a house conveyed will pass as against the grantee of an adjoining house: *Richards v. Rose*, 9 Excheq., 218, 2 Com. Law Rep., 311, 2 Am. Law Reg. (O.S.), 178.

And if the manner of conveying water over the land of the servient tenement be changed by the owner thereof without objection for a long time by the owner of the easement, the latter will be deemed to have acquiesced in the change: *Arnold v. Hudson River R. R.*, 49 Barb., 108.

The owner of such an easement is not restricted to maintaining the easement in the condition it was at the time of his purchase, but may make proper repairs thereon: *Beals v. Stewart*, 6 Lansing, 408.

* See note 6 American Rep., 306; *Thomas v. Thomas*, 2 Crompt., Mees. & Rosc., 84.

But he must take no more than is reasonable: *Voorhies v. Burchard*, 6 Lansing, 176.

Nor is the owner restricted to the use of water or a way which passes as an appurtenance for the purpose for which it was used at the conveyance: *Watts v. Kelson*, L. R., 6 Chy. App., 166.

The owner of an easement of drip may raise his walls provided he do not increase the drip: *Thomas v. Thomas*, 2 Crompt., Mees. & Roscoe, 84; *Harvey v. Walters*, 4 Eng. Rep., 892.

So if the eaves of a house have projected over the lands of another for more than twenty years, the owner of the house has no title in the land of such other person under the eaves, and cannot prevent him from building on the land if he can do so without interfering with the eaves: *Keats v. Hugo*, 115 Mass., 204.

Held that the following clause in a deed of land "reserving to myself the use of a well in the highway in front of said land," created a reservation, and not an exception, it appearing that the water in the well was ample for the use of both parties, and that therefore the grantor had no right to change the manner of obtaining water from the well, so as to exclude the grantee from its use: *Barnes v. Burt*, 38 Conn., 541.

The rule of law which creates an easement in favor of one of two tenements or heritages belonging to a single owner, upon the sale of one of them, is confined to cases where there is an apparent sign of servitude on the part of the other, which would indicate its existence to a person reasonably familiar with the subject upon an inspection of the premises: *Butterworth v. Crawford*, 46 N. Y., 349, reversing 3 Daly, 57; *Scott v. Bentel*, 23 Grattan (Va.), 1.

But see *Watts v. Kelson*, L. R., 6 Chancery Appeals, 166; *Hamel v. Griffith*, 49 How. Prac., 396; *Geoghegan v. Fegan*, Irish R., 6 Com. Law, 139.

The owner of two adjoining houses and lots in the city of New York, known as numbers 83 and 85, built a vault half on the lot of each, extended the division fence over the vault and then erected an outhouse for each dwelling, on either side of the fence over the vault. A drain from the vault ran through the lot of No. 85. Defendant purchased No. 85, receiving a full covenant deed without reservation. After that plaintiff purchased No. 83. Desendant closed up the drain. Held the servitude was not apparent, and no easement existed in favor of No. 83: *Butterworth v. Crawford*, 46 N. Y., 349, reversing 3 Daly, 57.

But see *Geoghegan v. Fegan*, Irish Rep., 6 Com. Law, 139; *Watts v. Kelson*, L. R., 6 Chancery Appeals, 166, and *Hamel v. Griffith*, 49 How. Prac., 306.

Though while the grantor of a house from which a drain runs over other lands belonging to him remains the owner of such servient tenement, he will be restrained from interfering with the drain. It is only a *bona fide* purchaser who has no knowledge of the drain at the time of his purchase who takes discharged of the easement:

Hamel v. Griffith, 49 How. Prac., 306; *Geoghegan v. Fegan*, Irish Rep., 6 C. L., 139.

It is however only such easements as are essential to the enjoyment of the property granted which pass. Where the defendant owning a grist-mill and the lands around it, had been accustomed to use an open space on the west side for mill purposes, mainly for customers to pass to and from the mill, and finally sold the mill and appurtenances, but no land west of the mill, it was held that the grantee took no right of way over said open space, the mill being otherwise accessible.

If there had been a right of way appurtenant to the mill over the defendant's said land prior to his purchase of the mill, it ceased to exist when the title of the mill and the land west of it were united in the defendant: and it having been so extinguished, and as the defendant retained the land west of the mill when he sold the mill, the sale would not revive the easement: *Plimpton v. Converse*, 42 Vermont, 712. See also *Denton v. Leddell*, 23 New Jersey Eq., 64, affirmed 24 New Jersey Eq., 567; see also *Stevens v. Dennett*, 51 N. H., 324; *Whalley v. Thompson*, 1 Bos. & Puller, 371.

The presumption of law that where the owner of an entire tenement divides the same and conveys a portion, the parties contract with reference to the visible physical condition of the property at the time may be repelled by actual knowledge on the part of the contracting parties of facts, which negative any deduction to be drawn from the apparent condition. Where there is proof of such knowledge, they are presumed to have contracted not solely with reference to its condition, as it would have been presented to a stranger, but as it was known to be by the parties: *Simmons v. Cloonan*, 47 N. Y., 3, reversing 2 Lansing, 346; *Curtiss v. Ayrault*, 47 N. Y., 73.

H. & L. being the owners of certain premises upon which was a mill known as the "old mill" erected a dam and reservoir, and constructed a flume to convey the water from the reservoir to the mill. H. having acquired title to the whole premises, conveyed the "old mill" property to B. The deed contained a grant of the rights and privileges to use the water of the reservoir

for the use of the mill, and a condition that in case the mill should not be kept in use, the water privilege and right of flowage should cease and revert to H. H. subsequently contracted to sell to B. a portion of the premises lying between the "old mill" and the reservoir. B. erected thereon a mill, took the water from the reservoir for its use, abandoning the "old mill," and thereafter assigned the contract to S., to whom H. conveyed pursuant to the contract. Neither the contract nor the deed made mention of the water privilege. S. conveyed to plaintiff. Subsequently H. conveyed the lands upon which was the reservoir to defendant C., who proceeded to fill up the reservoir and remove the flume. Held that the deed to L. related back to the date of the contract of sale, and was not a contracting between the parties in reference to the condition of the property at the date of the deed; that the right to the use of the reservoir and flume did not pass as an incident or appurtenance to the premises so conveyed, and that by the abandonment of the use of the "old mill" the rights of water and flowage reverted to H., and his grantee had the right to fill the reservoir and take up the flume: *Simmons v. Cloonan*, 47 N. Y., 3, reversing 2 Lans., 346; see also *Stevens v. Dennett*, 51 N. H., 324.

One tenant in common cannot, by his sole act, create an easement in the premises held in common. Nor can a tenant in common, who owns other premises, in severalty, so use the last as to acquire or exercise, for the benefit thereof, an easement in the property held in common; and he cannot by grant or by operation of an estoppel or otherwise, confer upon another rights and privileges which he does not possess: *Crippen v. Morse*, 49 N. Y., 63; *Hutchinson v. Chase*, 39 Maine, 508.

Where, therefore, a tenant in common, in a grant of premises held by him in severalty, has attempted to create an easement in the premises held in common, a subsequent grantee of all the tenants in common is not estopped by the fact of his succeeding to the interests of the one who granted the easement from asserting, as a grantee of the cotenants, the invalidity of the grant of the easement, and as against him it is void: *Crippen v. Morse*, 49 N. Y., 63.

It has been held that the grant of an easement to A. B. without adding "and to his heirs and assigns," does not re-strict the grant to A. B. during life only nor to him personally: *Coolidge v. Ha-ger*, 43 Vermont, 9.

[Law Reports, 10 Queen's Bench, 195.]

Jan. 27, 1875.

THE QUEEN, on the Prosecution of CERTAIN JUSTICES OF LEEDS, Respondents, v. VINE, Appellant.

Wine and Beer Amendment Act, 1870 (33 & 34 Vict. c. 29), s. 14—License to sell Spirits by retail—"Any person convicted of felony"—Retrospective Operation of Statute.

By 33 & 34 Vict. c. 29, s. 14, "every person convicted of felony shall forever be disqualified from selling spirits by retail, and no license shall be granted to any person who shall have been so convicted; and if any person after having been so convicted shall take out or have a license, the same shall be void to all intents and purposes; and every person who, after having been so convicted, shall sell spirits by retail, shall incur the penalty for doing so without a license."

Held (by Cockburn, C.J., and Mellor and Archibald, JJ.; Lush, J., dissenting), that the section applied to a person convicted of felony either before or after the act passed; and that licenses held by a person convicted before the act, became void on the passing of the act.

At the Quarter Sessions for the West Riding of Yorkshire held on the 6th of April, 1874, in an appeal, in which James Vine was appellant and certain justices of the borough of Leeds were respondents, the sessions dismissed the appeal, subject to the following case:

The Fox and Grapes is an old-established inn situate in the borough of Leeds, and in 1873 one James Theaker became by transfer the holder of licenses under 9 Geo. 4, c. 61, and subsequent statutes amending the same, by which he was empowered to keep the inn, and to sell excisable liquors by retail, to be consumed on the premises. The licenses to Theaker were duly renewed at the general annual licensing meeting in 1873.

*In January, 1865, Theaker had been convicted of [196 felony, and was then sentenced to and suffered three months imprisonment with hard labor. The fact of such conviction was first known to the authorities of the borough and the owners of the inn in the month of November, 1873.

Thereupon the appellant James Vine became tenant of the inn, and in February, 1874, applied to the justices of the borough for the transfer to him the licenses held up to that time by Theaker⁽¹⁾.

⁽¹⁾ Vine had left without transferring the licenses; and the application really was for a continuation of the licenses under s. 14, of 9 Geo. 4, c. 61, by which, when a person "duly licensed" removes

from the house, the licensing justices may grant to the new tenant a license to sell excisable liquors by retail for the remainder of the current year.

The justices refused the application on the ground that such licenses were void by reason of the conviction of Theaker for felony.

Upon the hearing of the appeal it was contended on the part of the appellant, and denied on the part of the respondents, that the licenses held by Theaker were subsisting at the time of the application to the justices by the appellant; and that 33 & 34 Vict. c. 29, s. 14, applied only to persons convicted of felony after the passing of that act⁽¹⁾.

The quarter sessions dismissed the appeal upon the ground stated by the justices of the borough.

The question for the opinion of the court was whether the licenses held by Theaker were or were not void by reason of his conviction for felony.

Maule, Q.C. (with him *Wilberforce*), for the respondents: The language of s. 14 of 33 & 34 Vict. c. 29, is clearly retrospective, so far as to apply to a person convicted of felony before the act. "Every person convicted of felony" can [197] only mean "every person *who is a convicted felon," is that "every convicted felon" shall be disqualified.

Poland, and *Tenant*, were then called upon for the appellant: The language of s. 14 is ambiguous, and must therefore be interpreted to be prospective, and to apply only to persons convicted after the act. The licenses of a person within this section are made absolutely null and void, and if it is applied to persons convicted before, a person who had held a license for twenty years, and expended large sums in improving the premises, would be suddenly deprived of his livelihood. This would be most unjust. Again, he might have been convicted of manslaughter under such circumstances as to have been merely fined in a nominal sum.

[*MELLOR*, J.: There would be the same hardship if the section only applied to convictions after the act.

COCKBURN, C.J.: In 3 & 4 Vict. c. 61, s. 7⁽²⁾, the words are, "every person who shall hereafter be convicted."']

(1) 33 & 34 Vict. c. 29, s. 14: "Every person convicted of felony shall forever be disqualified from selling spirits by retail, and no license to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid; and if any person shall, after having been so convicted as aforesaid, take out or have any license to sell spirits by retail, the same shall be void to all intents and purposes; and every person who, after being so convicted as aforesaid, shall sell any spirits by retail in any manner whatever, shall incur the penalty for doing so without a license."

(2) 3 & 4 Vict. c. 61, s. 7: "Every person who shall hereafter be lawfully convicted of felony, or of selling spirits without license, shall forever thereafter be disqualified from selling beer and cider by retail, and no license to sell beer and cider by retail under the said recited acts or this act shall be granted to any person who shall be so convicted as aforesaid; and if any such person shall, after having been so convicted as aforesaid, take out or have any license to sell beer or cider by retail under the said recited acts or this act, the same shall be void to all in-

That is the act as to beer licenses ; and the language is similar in 23 Vict. c. 27, s. 22⁽¹⁾, as to wine licenses ; and this affords a strong argument that the present enactment as to spirit licenses was not intended to extend further, but only to be prospective. If the contrary had been intended, unambiguous language would and ought to have been used, showing unequivocally that it was intended to apply to all convicted persons whenever their conviction took place. In Broom's Maxims, at pp. 34-40, where the cases are collected, it is said, "Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be *deemed retrospective in its operation, and [198] opposed to sound principles of jurisprudence. . . . Laws should be construed as prospective, not as retrospective, unless they are expressly made applicable to past transactions, and to such as are still pending. . . . *Moon v. Durdan*⁽²⁾ may be cited as a leading decision in reference to the application of the above maxim. The 8 & 9 Vict. c. 109, s. 18, enacts that, all contracts and agreements by way of gaming or wagering shall be null and void ; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made. This was held not to defeat an action for a wager commenced before the act passed. Parke, B., observes that the language, if taken in its ordinary sense, applies to all contracts both past and future, and to all actions both present and future, on any wager whether past or future. But it is, as Coke says, a rule and law of Parliament, that regularly *nova constitutio futuris formam imponere debet, non præteritis*. This rule, which is in effect that enactments in a statute are generally to be construed to be prospective, and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and has been acted upon in many cases. . . . Rolfe, B., also remarks that the principle is of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where

tents and purposes ; and every person who shall, after having been so convicted as aforesaid, sell any beer or cider by retail, in any manner whatsoever, shall incur the penalty of doing so without license." . . .

⁽¹⁾ 23 Vict. c. 27, s. 22, is in very similar language as to a license to sell wine under that act.

⁽²⁾ 2 Ex., 22.

1875

The Queen v. Vine.

there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively. . . . In *Marsh v. Higgins* ⁽¹⁾, Wilde, C.J., says that, Sometimes, no doubt, the Legislature finds it expedient to give a retrospective operation to an act to a considerable extent; but then care is always taken to express that intention in clear and unambiguous language. . . . Those whose duty it is to administer the law, says Erle, C.J., in *Midland Ry. Co. v. Pye* ⁽²⁾, very properly guard against giving to an act of Parliament a retrospective operation, unless the intention [199] of the Legislature that it *should be so construed is expressed in clear, plain and unambiguous language; because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law; and wherever it is possible to put upon an act of Parliament a construction not retrospective, the courts will always adopt that construction."

Maule, Q.C., was heard in reply, the court not being agreed.

COCKBURN, C.J.: I am of opinion that the rule should be discharged. I feel bound by the language used in s. 14 of 33 & 34 Vict. c. 29, which enacts, that "every person convicted of felony shall forever be disqualified from selling spirits by retail, and that no license to sell spirits by retail shall be granted to any person who shall have been so convicted; and if any person shall, after having been so convicted, take out or have any license to sell spirits by retail, the same shall be void to all intents and purposes." The question is, whether a person who had been convicted of felony before the act was passed became disqualified on the passing of the act. I think he did. If one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of Mr. Poland's argument, founded on the rule which has obtained in putting a construction upon statutes—that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public-houses in which

⁽¹⁾ 9 C. B., 581, 567; 19 L. J. (C.P.), 297.

⁽²⁾ 10 C. B. (N.S.), at p. 191; 30 L. J. (C.P.), 314.

spirits are retailed being kept by persons of doubtful character. It may be that the felony may in some instances be such as not to affect the character in the ordinary sense of the term, as when by negligence so as to involve no criminality of purpose, a person may have caused the death of another and have been convicted of manslaughter and suffered only a trifling punishment. But the Legislature has categorically drawn a hard and fast line, obviously with a view to protect the public, in order that places of public resort may be *kept by persons of good character; and [200 it matters not for this purpose whether a person was convicted before or after the act passed, one is equally bad as the other and ought not to be intrusted with a license. On looking at the act, the words used seem to import the intention to protect the public against persons convicted in the past as well as in future; the words are in effect equivalent to "every convicted felon." Suppose a man, convicted prior to the act, applied for a license, would the magistrates be justified in giving him a license on the ground that, having been convicted before the act passed, he was not disqualified? Surely not; the only question for the magistrates would be whether he had or had not been convicted of felony. We have in the preceding acts language quite different from the present, for it clearly pointed to the future only, and operated only upon future convictions; and with these statutes before them the Legislature has altered the language in this very striking manner, clearly with the intention of including all of the convicted class in one category. No doubt what Mr. Poland said as to the hardship, if a license is to become *ipso facto* on the passing of the act null and void, is just, because it is interfering to a certain extent with vested interests; but the Legislature might have made exceptions to meet these cases, but they have chosen rather, as I have said, a hard and fast line to meet all cases. I am therefore of opinion that Theaker became on the passing of the act disqualified, and the licenses null and void, and could not inure to the benefit of the proposed transferee, the subsequent tenant.

MELLOR, J.: I am of the same opinion. I do not dispute the general proposition put forward by Mr. Poland, nor the propriety of the *dicta* of the learned judges which he has cited. It appears to me to be the general object of this statute that there should be restraints as to the persons who should be qualified to hold licenses, not as a punishment, but for the public good, upon the ground of character. And

1875

The Queen v. Vine.

accordingly by this clause, instead of leaving open the inquiry as to character, it is enacted, that if a man has been convicted of felony, it shall not be necessary for the justices further to inquire into his character; but they shall not grant him a license. Convicted felons are to be an absolute [201] lutely *disqualified class, for the good reason that a man convicted of felony is tainted in character. A man convicted before the act passed is quite as much tainted as a man convicted after; and it appears to me not only the possible but the natural interpretation of the section that any one convicted of felony shall be *ipso facto* disqualified, and the licenses, if granted, void.

LUSH, J.: I am sorry that I cannot concur in the judgment of the rest of the court. I, of course, express my view with great diffidence, but I cannot bring my mind to their opinion. I fail to connect with s. 14 any indication of an intention to make its operation retrospective. The effect of the section, on the construction put by the rest of the court, is, undoubtedly, that every person holding a license, who had previously been convicted of felony, would at once, on the passing of the act, forfeit his license, and be deprived of all interest, and would be liable from the moment the act passed to penalties. This is, therefore, a highly penal enactment. The sound and well-established canon of construction is that such an enactment is to be read as prospective, unless a contrary intention be clearly established from the language used. Now I cannot collect any indication of an intention to make the enactment retrospective from the language used in s. 14. The words, "every person convicted of felony shall be disqualified," may mean either every person "who shall be convicted," or every person "who shall have been convicted." The expression is ambiguous, taking it alone. Nor does the subsequent part of the section throw any light upon it; it is equally applicable to a person convicted after the act as to a person convicted before. This is, therefore, the very case in which the above canon of construction applies, that no enactment should be interpreted prospectively, being a disabling and disqualifying enactment as to the position of the person convicted. If s. 14 stood alone, I should thus interpret it. But two other statutes have been referred to in *pari materie*, and they seem to me rather to confirm this view. By 3 & 4 Vict. c. 61, s. 7, it is enacted that every person who shall hereafter be convicted of felony shall forever thereafter be disqualified from selling beer by retail, and no license shall be

granted to any person who shall be so convicted. *This [202 was as to selling beer; then, by 23 Vict. c. 27, s. 22, a similar enactment was passed as to wine licenses. And s. 14 of the present act would naturally extend the disqualification as to selling spirits only to the same class; and, reading its ambiguous language by the light thrown upon it by the other statutes, I should read it as not *ipso facto* disabling a person convicted before the act. The argument was made that the omission of the words "who shall be hereafter" showed that the intention of the framer of the act was to make the section retrospective. What the intention may have been is mere matter of speculation; he may have intended to draw the section in a very condensed form, and struck out all the words that were considered superfluous. If it had been the intention to contrast this section with the former two, and to make it retrospective, the others being prospective only, I should have expected to find words clearly indicating such an intention. The words used are ambiguous, and what was the intention is therefore left to mere speculation; and, without any clear indication that it is intended to extend beyond the future, I think we ought to interpret the section as relating to the future alone, and not as retrospective in its operation.

ARCHIBALD, J.: I agree with the Lord Chief Justice and my Brother Mellor. I was at one time impressed with the argument of Mr. Poland, that the enactment was in its nature penal; and I quite agree, if it were simply a penal enactment, that we ought not to give it a retrospective operation; but it is an enactment with regard to public and social order, and the infliction of penalties is merely collateral. There seems to me, so looking at the act, to be no difference between the expression "every convicted felon" and the expression used in the first part of s. 14, "every person convicted of felony," and this must lead to the conclusion that this enactment was intended to be retrospective; and if the first part is meant to apply to any person whenever he may have been convicted, the same construction must apply to the latter part, and it must affect a license in force when the act came into operation. I draw from the former acts quite a different conclusion from my Brother Lush. The language of the former acts was clearly prospective, and only applied to the future, *and when the [203 language of the new act is altered, omitting the words which clearly confined the former enactments to the future, the only conclusion, as it seems to me, to be drawn is, that this

1875

Threfall v. Borwick.

was done with the object of making the enactment retrospective, and not prospective only.

Judgment for the respondents.

Attorneys for respondents: *Simpson & Co.*

Attorneys for appellant: *Massey, Taylor & Hales*, for *J. G. Turner, Leeds.*

[Law Reports, 10 Queen's Bench, 210.]

Feb. 3, 1875.

[IN THE EXCHEQUER CHAMBER.]

210]

*THREFALL V. BORWICK (').

Innkeeper, Lien of—Piano.

A. went to the defendant's inn and stayed there with his family for some time; he took with him to the inn a piano as his own which he had hired of the plaintiff. A. having left the inn in debt to the defendant, the defendant claimed as against the plaintiff to detain the piano by virtue of his lien as innkeeper:

Held, affirming the decision of the Court of Queen's Bench, that, whether the defendant as innkeeper was bound to take in the piano or not, having done so he had a lien upon it.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter the verdict for the plaintiff: Law Rep., 7 Q. B. 711, where the pleadings are fully stated.

The declaration was for detaining a piano-forte of the plaintiff.

Plea, *inter alia*, the defendant's lien as an innkeeper.

It appeared at the trial before Lush, J., at the Lancaster Spring Assizes, 1872, that the defendant kept an hotel on Lake Windermere, and one Butcher came there, with his wife and sister, in April, 1871. In addition to board and lodging, Butcher had a private sitting-room. He brought with him a piano-forte, which the defendant thought was Butcher's own, but which he had hired of the plaintiff. This was put in the sitting-room. After several weeks Butcher left the hotel £45 in the defendant's debt for board, &c.; and on demand by the plaintiff, the defendant claimed to detain the piano, in exercise of his lien as innkeeper, for the debt due from Butcher.

A verdict passed for the defendant, with leave to move to enter it for the plaintiff for twenty-two guineas, and a rule was obtained accordingly, on the ground that the plaintiff had no lien upon the piano. The Court of Queen's Bench discharged the rule (*).

(') Affirming 2 Eng. Rep., 689.

(*) Law Rep., 7 Q. B., 711.

J. Edwards, Q.C., for the plaintiff: It must be admitted that an innkeeper has a lien on goods brought by the guest as his own, although they do not really belong to him. But the lien is only upon such goods as he would be bound to take in. In **Broadwood v. Granara* ⁽¹⁾, in which the [211] defendant claimed a lien upon a piano which had been sent by the plaintiffs to the defendant's inn for the use of a guest, Parke, B., in the course of the argument, says: "An innkeeper has a lien on such goods only as he is compelled to receive with his guest. Could he be indicted for not receiving a piano-forte? It might be a nuisance to persons in his house." And, again, in his judgment, the same learned judge says: "The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive. The obligation to receive depends upon his public profession. If he has only a stable for a horse he is not bound to receive a carriage. There was no ground whatever for saying that the defendant was under an obligation to receive this piano-forte."

[LORD COLERIDGE, C.J.: The 5th resolution in *Calye's Case* ⁽²⁾ extends the innkeeper's liability for loss beyond that. Is there any authority, except the *dicta* of Parke, B., which were unnecessary for the decision of the case in hand, that the lien is only commensurate with the obligation to receive?]

No other authority can be found. In *Yorke v. Greenough* ⁽³⁾ the right seems to have been based on the obligation to receive.

[BRAMWELL, B.: If the piano had been stolen would the defendant have been liable?]

It must be conceded that he would.

[BRAMWELL, B.: Is not that conclusive in favor of the lien?]

W. G. Harrison, for the defendant, was not called upon.

LORD COLERIDGE, C.J.: The plaintiff's counsel has said all that could be urged in support of his case, which is really hopeless. It is admitted that in general an innkeeper has a lien on all goods which the guest brings with him as his own, whether they are his own or another's; and the only question raised is, whether the lien extends to goods which the

⁽¹⁾ 10 Ex., 417, 420, 423; 24 L. J. (Ex.), 1.

⁽²⁾ 8 Co. Rep., at folio 33, a.

⁽³⁾ 2 Ld. Raym., 866.

1875

Gallin v. London and North Western Railway Co.

212] innkeeper would not have *been bound to receive. I may say that I should be inclined to agree, if a guest brought a piano with him for his own amusement, that, according to the advanced usages of society, the innkeeper might be well held to be bound to receive it, if he has room for it. But it is quite unnecessary to decide that question, because we are all clearly of opinion that, the defendant having taken in the piano and safely kept it, it is too clear to be doubted that he has a lien upon it. Both on principle and authority the judgment must be affirmed.

Bramwell, Cleasby, Pollock, and Amphlett, BB., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Williamson, Hill & Co., for Woodburne & Poole, Ulverston.*

Attorney for defendant: *John Scott, for Fisher, Windermere.*

See note 2 Eng. Rep., 699; also Mr. Perkins's note (h), 1 Chitty on Contract (11th Am. ed.), 678-9.

In Georgia it has been held that "an innkeeper has no lien on the goods in

possession of his guest, as against the true owner, unless there be charges upon the specific article on which the lien is claimed": *Domestic, etc., v. Walters*, 50 Georgia, 573.

[Law Reports, 10 Queen's Bench, 212.]

Feb. 3, 1875.

GALLIN V. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—Carrier of Passengers—Passenger travelling free at his own Risk—Negligence.

The plaintiff travelled by the defendants' railway from L. to G. as a drover with cattle, without payment, on the condition, which he knew, that he travelled at his own risk. On the train arriving at G. it stopped on a bridge over a river; the parapet of the bridge was very low and dangerous, and the night dark. The plaintiff got out of the train, and in walking along the railway from the spot where the train stopped to go off the defendants' premises, fell over the parapet of the bridge and was injured:

Held, that the terms under which the plaintiff travelled exempted the defendants from liability, not only during the actual transit on the railway, but whilst the plaintiff was going from the defendants' premises.

FIRST COUNT, that the defendants were carriers of passengers on a railway from Preston to Garstang, and used a station at Garstang for the reception and accommodation of their passengers, which station was in the possession and under the management of the defendants; that the plaintiff was a passenger of the defendants to be carried from Preston to

Garstang for reward to the defendants. Breach: that the defendants negligently conducted themselves *in and [213 about carrying the plaintiff on the journey and in the management of the train whilst the plaintiff was a passenger, so that the plaintiff was thrown down whilst alighting from the train at Garstang and was injured.

Second count, similar to the first, but alleging as a breach that the defendants negligently managed the station and carriages, and placed the carriages at inconvenient and dangerous places in the station, and kept the station in a dangerous state, and omitted to light the station in a proper manner for the use and accommodation of their passengers safely to depart from the carriages on their arrival at the station, whereby the plaintiff, on alighting from the carriages at the station at Garstang, was thrown down and injured.

Third count, that the defendants were possessed of a railway from Preston to Garstang, and were carriers of passengers for hire; that the plaintiff had become a passenger of the defendants to be by them, as such carriers, carried from Preston to Garstang for reward to the defendants, and had been so carried from Preston to Garstang; and at Garstang, at the request and invitation of the defendants, the plaintiff alighted from the carriage in which he had been such passenger; and the railway was, as the defendants well knew, unlighted, unfenced, unguarded, and in a dangerous condition, and was unfit for the reception of passengers alighting from carriages, whereby the plaintiff, in lawfully walking along the railway for the purpose of leaving it at the place directed by the defendants, fell over a wall, and was injured.

Pleas. 1. Not guilty. 2. That the plaintiff was not a passenger. 3. As to third count, that defendants did not know that the railway was unlighted, unfenced, unguarded, and in a dangerous condition, as alleged.

Issue joined.

At the trial before Amphlett, B., at the Liverpool Spring Assizes, 1874, the following facts were proved: The plaintiff was a cattle dealer, and forwarded two trucks containing cattle from Liverpool to Garstang. The train, with the cattle trucks attached, travelled as far as Lostock Hall on the Lancashire and Yorkshire Railway, and from thence to Garstang by the defendants' railway. The plaintiff having obtained of the officials of the defendants' railway, two cattle labels, the cattle trucks were, at Lostock Hall, *de- [214 tached from the train and attached to a train belonging to the defendants' railway; the plaintiff travelled as a drover with the cattle from Lostock Hall to Garstang, paying nothing, the

condition, which he knew, being that he travelled at his own risk. The train, on arriving at Garstang, stopped for the purpose of shunting the cattle trucks to the cattle station, and the plaintiff, at the request of the guard, got out of the van in which he was travelling as a drover. The train had stopped near a bridge over the river Calder, and the parapet of the bridge was very low and dangerous, and the night dark. The plaintiff, in walking from the spot where the train stopped along the railway to the passenger station, fell over the bridge into the river and was injured.

It was contended, on behalf of the defendants, that assuming they were guilty of negligence, they were not liable as the plaintiff was travelling at his own risk.

The jury found a verdict for the plaintiff for £325 damages, leave being reserved to the defendants to move, the court to make any amendment in the pleadings that might be necessary.

A rule was afterwards obtained to enter a nonsuit or a verdict for the defendants, on the ground that the plaintiff was travelling at his own risk, and that there was no negligence on the part of the defendants or their servants.

C. Russell, Q.C., and *French*, showed cause: The question is, assuming that the plaintiff is travelling "at his own risk," is there any negligence by the company or breach of duty by the company which gives the plaintiff a right of action? In the case of carriage of goods, the courts have held that where there is a condition that the carrier is not to be liable for any risk of carriage, such a condition covers every injury that happens to the goods during their transit, but that the carrier is not exempt from liability where there has been an unreasonable delay in forwarding the goods to their destination: *Robinson v. Great Western Ry. Co.* ⁽¹⁾; *D'Arc v. London and North Western Ry. Co.* ⁽²⁾. From this it may be fairly argued that a general condition to travel "at his own risk" does not cover all risks incident to the act of carrying; for instance, if a passenger travelling at his own risk has been delayed for an unreasonable *time at an intermediate station in consequence of the company's negligence, they would not be exempt from liability. There are therefore certain risks for which the company would be liable. Here the journey was at an end when the train stopped, and the plaintiff got out. The contract under which the plaintiff was carried was that he was to be at his own risk during the journey. When the journey ended, the plaintiff was on the premises lawfully with the defen-

⁽¹⁾ 35 L. J. (C.P.), 123.

⁽²⁾ Law Rep., 9 C. P., 325.

dants' license; he had then the same rights as against the company as any person lawfully upon the premises would have. The plaintiff having been injured whilst lawfully on the premises, he was entitled to bring his action. *Hodgman v. West Midland Ry. Co.* (1), which will be relied on by the defendants, is not in point; it was a decision founded on the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, s. 2), and turned on the interpretation of the words "receiving, forwarding, and carrying."

Aspinall, Q.C., and *A. G. Shiell*, in support of the rule, were not heard.

BLACKBURN, J.: I think there can be no doubt the rule must be made absolute to enter a nonsuit. It must be taken to be the fact that the plaintiff was travelling on the defendant's railway gratis, and on the terms that it should be at his own risk, and the question reserved was, whether the fact that the plaintiff was travelling at his own risk exempted the company from liability for that which would have been negligence as against an ordinary passenger. The principle on which the company would be liable in such a case is stated in *Parnaby v. Lancaster Canal Co.* (2), and has since been acted on in numerous cases. A person, who invites another to come on his premises, undertakes with regard to that person a duty to take reasonable care that the premises on which he invites the person to come, the approach to the premises, as well as the exit, shall be in such a state as not to expose the person using them in consequence of the invitation to undue or unreasonable danger. That is the implied engagement of the company to any passenger who comes on the premises. Whether there would be any such implied engagement towards a person who *was invited to come on premises without any [216 payment of money or towards a volunteer we need not inquire. There is such an implied engagement to a passenger, because such implied engagement and duty is part of their contract with the passenger. But here the stipulation of the company is "We will take you free, provided you travel at your own risk." That certainly seems to me to amount to this: "We claim that we shall be free from liability for the negligence of our servants, and also that we shall be free from the consequences of those incidental risks, both before and after the actual transitus, arising from the state of the premises." I think the decision of the majority of the court in *Hodgman v. West Midland Ry. Co.* (1)

(1) 5 B. & S. 173; 33 L. J. (Q.B.), 233; in error, 6 B. & S., 560; 35 L. J. (Q.B.), 85.

(2) 11 A. & E., 223.

1875

Gallin v. London and North Western Railway Co.

goes to this extent, because it was there held that the limitation of the value to £50 under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, s. 2) extended to an accident happening to a horse while yet in the hands of the plaintiff's servant, in leading it into the yard of the defendant company. Their liability was limited, notwithstanding that the mischief happened to the horse in consequence of the yard not being kept reasonably safe for persons coming with horses into the yard, with the intention of having them carried by the railway. *Carr v. Lancashire and Yorkshire Ry. Co.* (1), the case which led to the passing of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), is also a strong authority in favor of the defendants. In that case the horse was killed by the gross and culpable negligence of the driver of another train, a servant of the company, and if the horse had been the property of a stranger, or even if it had been trespassing on the railway and could not get out of the way of the coming train, the company would have been liable; yet the Court of Exchequer held that, as there was a stipulation in the contract of carriage that the horse should be carried at the risk of the person sending it, they must give judgment for the defendants, leaving it to the Legislature, if they thought fit, to alter the law; an appeal which the Legislature very soon answered by passing the Railway and Canal Traffic Act. I think the rule to enter a nonsuit must be made absolute.

217] *MELLOR, J.: I am of opinion that the words "travel at his own risk" include, as in *Hodgman v. West Midland Ry. Co.* (2), all the incidents connected with the journey. I think all those risks which result or arise during the transit, and until the transit is actually at an end, are intended to be guarded against and are actually guarded against by those words.

LUSH, J.: The only point is, what is the extent and meaning of the stipulation to which the parties have come? I entirely agree that that stipulation covers not only the transit on the line of railway, but also the access to and departure from the railway, all that takes place while the person is a passenger.

Rule absolute (3).

Attorneys for plaintiff: *Vizard & Co., for J. J. Yates, Liverpool.*

Attorney for defendants: *R. F. Roberts.*

(1) 7 Ex., 707; 21 L. J. (Ex.), 261.

(2) See *McCawley v. Furness Ry. Co.*,

(3) 5 B. & S. 173; 33 L. J. (Q.B.), 283; Law Rep., 8 Q. B., 57. In error, 6 B. & S., 560; 35 L. J. (Q.B.), 85.

It has been held in Minnesota (*Jacobus v. St. Paul, etc.*, 20 Minn., 125) that one riding on a free pass which directed him to be passed "upon the conditions indorsed hereon," which were, "The person who accepts and uses this free ticket thereby assumes all risk of accident and agrees that the company shall not be liable under any circumstances, whether by negligence of its agents or otherwise, for any injury of the person, or for any loss or injury to his property, while using or having the benefit of it," could recover for an injury received through negligence of defendants' employees though he were at the time riding in the baggage car.

The court concedes the rule would be otherwise in New York (cases cited 4 Eng. Rep., 220, note) and New Jersey (*Kinney v. R. R. Co.*, 24 New Jersey Law, 513); but say it is held he can recover in Pennsylvania (*R. R. Co. v. Henderson*, 51 Penn. St. R. 315; *R. R. Co. v. McClosky*, 28 Penn. St., 526); in Illinois (*R. R. Co. v. Read*, 37 Illinois, 484; *R. R. Co. v. Morrison*, 19 Illinois, 136); in Indiana (*R. R. Co. v. Mundy*, 21 Indiana, 48); in Alabama (*R. R. Co. v. Hopkins*, 41 Ala., 486; *R. R. Co. v. Selby*, 47 Indiana, 471); and in Ohio (*Cleveland, etc., v. Curran*, 19 Ohio St. R., 1).

And according to the determinations of the Supreme Court of the United States (*R. R. Co. v. Derby*, 14 Howard U. S., 468, 486; *Steamboat, etc., v. King*, 16 How. U. S., 469, 474; *R. R. Co. v.*

Lockwood, 17 Wallace, 357), it holds the weight of authority to be in favor of the responsibility of the railway company and so determines.

Where one purchased a right to sell newspapers on the cars of a railroad company upon condition that the latter should not be liable for an injury to him or his employees, held a newsboy injured by an accident could not recover though he had no notice of such agreement: *Alexander v. Toronto, etc.*, 35 Upper Canada, Q. B., 458.

One who has reached the railway grounds on his way to become a passenger may recover if negligently injured, unless the company be exempted from liability by contract: *Poucher v. N. Y. Cent. R. R.*, 49 N. Y., 264; *Gordon v. Grand Street, etc.*, 40 Barb., 546; *Tobin v. R. R. Co.*, 59 Maine, 183, 8 Am. Rep., 415, 417 note.

One who is riding in good faith upon the pass of another person may recover if negligently injured unless the person named would be precluded from recovering: *Great, etc., v. Harrison*, 10 Exchequer, 376.

But even in New York one who has not agreed to assume the risk of accident while riding on a free pass may recover: *Notten v. Western, etc.*, 17 N. Y., 444.

Otherwise if he do: *Welles v. N. Y., etc.*, 26 Barb., 641, affirmed 24 N. Y., 181; *Boswell v. Hudson, etc.*, 5 Bosw., 699.

[Law Reports, 10 Queen's Bench, 217.]

Jan. 18, 1875.

GREENFIELD V. REAY.

Libel—Criminating Interrogatories, as to the Authorship and Publication.

In an action for libel, on an affidavit that the libel was in a printed handbill to which there was no printer's name, that the plaintiff could not ascertain who was the printer, and that the defendant had been seen with a person who affixed some of the handbills, and was also seen posting one himself, the court allowed interrogatories to be administered to the defendant as to whether he had not been instrumental in printing and publishing the libel.

DECLARATION for printing and publishing of the plaintiff, in the way of his trade as a butcher, a libel in the shape of a placard, notice, or handbill, alleging that the plaintiff had been recently brought up before the magistrates at the Sun-

1875

Greenfield v. Reay.

derland borough police court for being in possession of short weights, and that he had previously made his appearance at the police court on other charges.

The matter having been before Lush, J., at Chambers, who referred it to the court,

Crompton moved for a rule ordering interrogatories to be 218] *exhibited to the defendant as to whether the defendant had not been instrumental in the printing and circulating and posting of the above handbill. He moved on an affidavit by the plaintiff, stating that he was a butcher in Sunderland, and was the person intended by the handbill; that the handbill had no printer's name attached, and the plaintiff could not ascertain who was the printer of it; that the plaintiff had reason to believe that the handbills were printed and circulated under the direction of the defendant. That the defendant was seen with a man who actually affixed and delivered the handbills; that the plaintiff himself saw the defendant affix one of the handbills on the shutters of a shop in Sunderland, and the plaintiff, in the defendant's presence, tore it down.

Hugh Shield showed cause in the first instance, and contended that as the answers to the proposed interrogatories might criminate the defendant, they ought not to be put. He cited *Stern v. Sevastopulo* (¹), and *Edmunds v. Greenwood* (²), and contended that there was nothing in the circumstances stated in the affidavit to bring the case within the exception from the general rule, as enunciated in the judgment of the Court of Common Pleas in the latter case.

COCKBURN, J.: We are quite agreed that there are special circumstances here which take the case out of the general rule, and entitle the plaintiff to administer the proposed interrogatories. For myself, I am not inclined to extend the protection which has been given to defendants in actions of libel.

BLACKBURN; MELLOR and LUSH, JJ., concurred.

Rule absolute.

Attorney for plaintiff: *G. J. Brownlow.*

Attorney for defendant: *John Scott, for William Bell, Sunderland.*

(¹) 14 C. B. (N. S.), 737; 32 L. J. (C. P.), 268.

(²) Law Rep., 4 C. P., 70.

C A S E S
DETERMINED BY THE
COURT OF QUEEN'S BENCH,
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,
IN AND AFTER
EASTER TERM, XXXVIII VICTORIA.

[Law Reports, 10 Queen's Bench, 219.]

April 27, 1875.

***WHITE V. THE HINDLEY LOCAL BOARD OF HEALTH. [219**

*Local Board of Health, Liability of, for Defect in Grating over a Sewer—11 & 12
Vict. c. 63, ss. 43, 45.*

As the plaintiff was riding along a highway, under which was a sewer, his horse trod on a grid, or grating, put there to drain the surface-water off the road into the sewer. The grid being in a defective state gave way, and the horse's leg was injured. Plaintiff brought an action against the Local Board of Health of the district, who are the surveyors of the highway, by ss. 63, 117, of 11 & 12 Vict. c. 63, and in whom also the sewers are vested under ss. 43, 45:

Held, that, though the defendants might not be liable as surveyors of the highway, they were liable as owners of the sewer, of which the grid formed part, for negligence in not keeping the grid in a proper state.

APPEAL from the County Court of Lancashire, holden at Wigan.

This was an action against the defendants, a Local Board of Health established under the Public Health Act, 1848 (11 & 12 Vict. c. 63), for the district of Hindley, for injury sustained by the plaintiff's horse, by reason of its putting one of its feet upon a grid which was out of repair on the highway in Hindley leading from Wygan to Leigh, and within the district and within the lighted area of the Hindley Local Board, in the month of April, 1874.

*The plaintiff's notice of action was admitted by the [220 defendants to have been duly given and to be sufficient, and

1875

White v. Hindley Local Board.

the amount of damage sustained by the plaintiff was also admitted.

The cause of action stated in the notice was, "For that you, the Local Board of Health, your servants, workmen, and others, on, or about the 10th of April last, and for some time previously, did wilfully, wrongfully and negligently permit and suffer a certain grid or grating placed in or upon the surface of a certain public turnpike road or highway in Hindley leading from Wigan to Leigh, and above a certain sewer running under the said road, to remain in a broken, dangerous and unsafe state and condition, which said grid or grating and sewer were and are under your control and management, and that you did so wilfully, negligently, and improperly, and in violation of your duty in that behalf, conduct yourselves in the keeping and control of the said grid or grating, and in permitting the same to remain unrepaired as aforesaid without taking due and reasonable care and precaution to guard against danger or damage to horses, carts, and persons lawfully passing along and over the said road, that by reason thereof, and of the premises, a horse belonging to me which was on the said 10th day of April last being lawfully ridden and passing along the said road, was injured."

The following facts were proved: The highway leading from Wigan to Leigh is, to the extent of 13 ft. in width, paved with stone sets, and the other part of 10 ft. 4 in. is soft, being composed of cinders, used both by persons travelling on horseback and pedestrians. At the edge of the part of the road which is paved, and within the cinder or soft part of the road, are iron grids, or gratings, about sixteen inches square on the outside and twelve inches square on the inside. The grids were placed at equal distances of about 100 yards along the road, for the purpose of conveying the surface-water off the paved portion of the road into a sewer running under the grids.

The grids were so placed in the road before the Local Board was established, and upon its formation the sewer and the grids became vested in, and belonged to, and were entirely under the management and control of, the Board of Health.

On the 10th of April, 1874, the plaintiff's son was riding [221] the *plaintiff's horse along the highway in question, in the daylight, and in attempting to pass a cart which was going in the same direction as himself, he rode his horse off the paved part of the road on to the cinder or soft part, and in doing so the horse put its foot upon the grid in question, two bars of which had been previously broken, and a third

bar gave way; and the horse's hind foot went through the grid, and it remained fixed to and was pulled out of its bed by the horse's leg, the horse being thereby damaged and injured.

It was proved that the grid had had two bars broken for six months prior to the accident, but it did not appear that any notice of its defective state had been given to the Local Board; and the clerk of the Local Board, the only witness called by the defendants, said that he was not aware of it, and he was the proper party to be served with all notices intended for the Local Board. He also stated that it was the duty of the foreman of the Hindley Local Board to look after the roads at the time of the accident, and that he should consider such foreman guilty of neglect if he had allowed a grid to remain broken for six months without communicating the fact to the Local Board. The same witness added that he saw no objection to the plaintiff's son riding where he was when the accident occurred.

It was contended for the plaintiff that one or more of the servants of the defendants had been guilty of such negligence as to make the defendants responsible in damages to the plaintiff, and the case of *Foreman v. Mayor of Canterbury* (*), with the cases therein cited, was relied upon.

It was contended for the defendants that the act complained of amounted to a nonfeasance only, for which the plaintiff had no remedy by action, but only by an indictment, and *Gibson v. Mayor of Preston* (†) was relied upon.

The judge gave a verdict for the plaintiff; but, on the application of the defendants, gave leave to appeal; and the question for the opinion of the court was whether, under the above facts, the defendants are or are not liable in an action for the injuries caused to the plaintiff's horse.

**Baylis*, for the defendant: The cause of action is [222 nonfeasance, not misfeasance, and for that the defendants as the Local Board are not liable: see per Willes, J., in *Parsons v. St. Mathew* (*). In *Foreman v. Mayor of Canterbury* (†) the act for which the defendants were held liable was a misfeasance.

[BLACKBURN, J.: The question is not whether the act was one of omission only or of commission; but whether there is any duty on the defendants for the violation of which an action will lie at the suit of the person injured by it. The ground of the decision in *Parsons v. St. Mathew* (*) was, that the duties and liabilities of the surveyor of highways were

(†) Law Rep., 6 Q. B., 214.

(*) Law Rep., 5 Q. B., 218.

(‡) Law Rep., 3 C. P., 56, 60.

1875

White v. Hindley Local Board.

transferred to the vestry by s. 96 of 18 & 19 Vict. c. 120, and no more.]

That case then is directly in point for the defendants, as ss. 68 and 117 of 11 & 12 Vict. c. 63, only substitute the Local Board for the surveyor of highways, and impose no new liability upon them. *Gibson v. Mayor of Preston*⁽¹⁾ is directly in point, and is not touched by *Foreman v. Mayor of Canterbury*⁽²⁾.

[BLACKBURN, J.: The question seems to be rather one of fact,—whether the keeping the grid in order is part of the duty of keeping the road in repair merely; or whether the grid can be said to be part of the property of the Local Board, in which case the defendants would be liable according to the principle of *Mersey Docks v. Gibbs*⁽³⁾.]

Appleton, for the plaintiff: It is unnecessary to dispute the points made for the defendants. There is a duty upon them, independently of their office of surveyors of highways. By ss. 43, 45, of 11 & 12 Vict. c. 63, the sewers are vested in the Local Board; and it is expressly found in the case that this grid and sewers are so vested.

[BLACKBURN, J.: Is the grid part of the sewer or part of the highway? Possibly it is part of both: see *Hamilton v. St. George*⁽⁴⁾.]

The grid is certainly part of the sewer; though put there to drain the road, it would not be there but for the sewer, and it is part of the apparatus of the sewer.

Baylis, in reply: It must be admitted that, according to 223] the *definition in s. 2, this sewer became vested in the defendants; but the grid was put there as essential to drain the road, and it is therefore part of the road and not part of the sewer.

BLACKBURN, J.: I am of opinion that judgment must be for the plaintiff. I think Mr. Baylis was right in the view he took; but that Mr. Appleton was also right in the view he took; which has not been displaced by what Mr. Baylis said in reply. Mr. Baylis, I think, is justified in saying that the Local Board, so far as they are surveyors of the highway, are not liable for the non-repair of this grid, because the inhabitants are the persons liable for the non-repair of the highway, and the Local Board are not substituted for the inhabitants, but are only made surveyors of highways; the decision of this court in *Gibson v. Mayor of Preston*⁽⁵⁾, and of the Common Pleas in *Parsons v. St. Mathew*⁽⁶⁾,

⁽¹⁾ Law Rep., 5 Q. B., 218.

⁽²⁾ Law Rep., 6 Q. B., 214.

⁽³⁾ Law Rep., 1 H. L., 93.

⁽⁴⁾ Law Rep., 9 Q. B., 42.

⁽⁵⁾ Law Rep., 5 Q. B., 218.

⁽⁶⁾ Law Rep., 3 C. P., 56.

bears this out. Consequently, if they were simply charged for non-repair of the road the defendants would not be liable. But Mr. Appleton points out that the Local Board are not only surveyors of the highway, but also by ss. 43 and 45 (of 11 & 12 Vict. c. 63) all sewers in the district are vested in them; and consequently the Local Board fill two capacities, one as surveyors, the other as proprietors of the sewers. Now the placing of this grid over the opening from the road into the sewer evidently was done with two objects, the one to prevent the hole from being dangerous, the other, that while allowing the water to flow from the road into the sewer, the grating might prevent the stone and other matters from passing through; one purpose was, therefore a road purpose, the other a sewer purpose. And the grid being there for both purposes, the defendants have at least a joint liability with themselves as surveyors in their capacity of owners of the sewers. In the case of a trap opening from the highway into a cellar, I apprehend the parties having the care of the highways, or their servants, would be wrong if they allowed them to remain in a dangerous state; but the owners of the cellar would be under a liability to keep it so as not be a nuisance; and a person injured from it being left out of repair would have a right of action against the owner of the cellar. The Local Board here are under the same obligation, as proprietors of the sewers, to keep these grids *in due order, [224 being put down for a purpose common to the highway and sewers. It appears that the grid in question had been left in a dangerous condition for six months. The defendants, therefore, are liable, at all events in their capacity of owners of the sewers.

FIELD, J.: I have come to the same conclusion. I feel myself able to infer from the statement in the case, that this grid did serve a purpose connected with the sewer, and consequently the defendants are liable as the owners of the sewer.

Judgment for the plaintiff.

Attorneys for plaintiff: *Gregory, Rowcliffes & Co.*

Attorneys for defendants: *Paterson, Snow & Burney, for Wright & Appleton, Wigan.*

[Law Reports, 10 Queen's Bench, 224.]

May 4, 1875.

WESTWICK V. THEODOR.

Master and Apprentice—Independent Stipulations—Misconduct of Apprentice—Discharge of Master's Obligation to instruct.

Declaration, that the defendant agreed with the plaintiff to take his son as an apprentice for three years, to learn the business of a tea-broker; and in consideration of £200, to teach him such business and pay him a salary, provided that he should obey all commands and give his services entirely to the business during office hours: Breach, that the defendant dismissed the son from his service. Plea: that the son misconducted himself in the service, by wilfully disobeying the orders of the defendant, and by habitually neglecting his duties and refusing to give his services during office hours without just cause, wherefore the defendant discharged him:

Held, on demurrer, that the proviso empowered the defendant to discharge the apprentice, and that the plea was good.

DECLARATION, that the defendant agreed with the plaintiff, as follows: "I hereby agree to take your son, T. B. Westwick, as an apprentice for three years from the 1st of December, 1873, to learn the business of a tea-broker, or merchant, and in consideration of the sum of £200 paid to me by you, I agree to teach T. B. W. such business by the best means in my power, and further, agree to pay him a salary of £30, £50 and £70, per annum, respectively for 225] *the three years: provided always, that he obeys all commands and gives his services entirely to the business during office hours." Averment of conditions precedent: Breach, that the defendant did not teach T. B. W. in his business as aforesaid for the period and on the terms aforesaid, and before the three years dismissed T. B. W. from the service, and refused to retain him therein for the remainder of the term.

Plea: As to dismissing T. B. W., that after the contract and before breach, T. B. W. misconducted himself in the service by wilfully disobeying the reasonable and lawful orders of the defendant, by him given to T. B. W., in the service, and by habitually neglecting his duties in the service, and failing to perform the same, and by absenting himself from the defendant's service and refusing to give his services during office hours without just cause, and by acting and behaving with insubordination to the defendant so being his master; wherefore the defendant then discharged T. B. W. from the service, which is the alleged breach.

Demurrer to the plea and joinder.

Purvis, in support of the demurrer: The plea is bad.

The apprentice's misconduct is no justification for the dismissal. The stipulations in the contract are independent. The master agrees to instruct the apprentice, and he is bound to perform his agreement; if the apprentice misconducts himself the master's remedy is by action. If the stipulations were not independent, the master could dismiss the apprentice the day after he entered his service, and retain the whole of the consideration: *Campbell v. Jones* (1); *Winstone v. Linn* (2); *Phillips v. Clift* (3).

[BLACKBURN, J.: In *Winstone v. Linn* (4), Bayley, J., says: "If the parties had intended that the master should have such a power," that is, a power to dismiss the apprentice, "they might have provided for it by the express terms of the deed." Here the defendant has agreed to teach the apprentice, provided he obeys all commands and gives his services entirely to the business during office hours.]

The stipulations, nevertheless, are independent according to the rule laid down in *Pordage v. Cole* (5), that where [226 a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant. The same rule is laid down in *Boone v. Eyre* (6).

Francis, contra, was not called upon.

BLACKBURN, J.: It is unnecessary to hear counsel in support of the plea. It is true that the consideration is paid for the whole service, and that in general misconduct on the part of the apprentice would not put an end to the contract. The cases referred to during the argument support that contention. But in *Winstone v. Linn* (7), Bayley, J., in his judgment, points out that if the contract in express terms gives the master a power to dismiss the apprentice, the case would be different. I think here the contract provides that if the apprentice misconducts himself the master may dismiss him. I do not say that upon a fair construction of the proviso that one act of disobedience would be a breach of the condition, but we must look at the plea which must be taken to be true. The averment is, that the plaintiff's son wilfully disobeyed the defendant's orders, and habitually neglected his duties; I cannot say what amount of disobedience would justify a dismissal; it is a question of degree, which would be for a jury; but I am of opinion that the plea is good.

(1) 6 T. R., 570.

(2) 1 B. & C., 460.

(3) 4 H. & N., 168; 28 L. J. (Ex.), 153.

(4) 1 B. & C., at p. 468.

(5) 1 Wms. Saund., 320c, note (4).

(6) 1 H. Bl., 273, note.

(7) 1 B. & C., at p. 468.

1875 North of England Oil-Cake Co. v. Archangel Insurance Co.

MELLOR, J.: I am of the same opinion. The plaintiff's contention would be good, but for the proviso in the contract. The plea is good.

FIELD, J., concurred.

Judgment for the defendant.

Attorneys for plaintiff: *Noon & Tiddeman.*

Attorney for defendant: *Anthony Carr.*

[Law Reports, 10 Queen's Bench, 249.]

April 30, 1875.

**249] *THE NORTH OF ENGLAND PURE OIL-CAKE COMPANY
V. THE ARCHANGEL MARITIME INSURANCE COMPANY.**

Policy of Marine Insurance, Assignment of—Assignment after Interest of Assignee had ceased—31 & 32 Vict. c. 86, s. 1—Sold-note, Construction of.

On the 24th of November, 1871, V. Brothers insured with defendants in London a cargo of linseed, belonging to them, then on board a brig at Constantinople, for a voyage thence to a port of call and discharge in the U. K. to be named, including all risks of craft or lighters to and from the brig, each lighter to be considered as if separately insured, the policy expressing the agreement to be with V. Brothers and their assigns. The linseed was shipped under a bill of lading, whereby it was to be delivered at a safe port in U. K. to V. Brothers or assigns. Whilst the brig was on the voyage the agents of V. Brothers, on the 17th of February, 1872, sold in London to plaintiffs the cargo of linseed; by the sold-note the seed was to be delivered at destined port in sound merchantable condition, and paid for in fourteen days from being ready for delivery by cash less 2½ per cent. discount, or at seller's option on handing shipping documents, less interest at 5 per cent. The vessel to go to any safe floating port in U. K. The bill of lading was indorsed to plaintiffs. On the 21st of February, plaintiffs named a safe floating port, and on the arrival of the brig at the port the cargo was landed by public lighters employed by plaintiffs; on the 28th of February, one of the lighters was sunk off the plaintiffs' wharf, being a loss within the terms of the defendants' policy. The loss occurred when part only of the cargo had been discharged, and before plaintiffs had paid the price of the cargo. In June, 1872, the policy was handed by V. Brothers to plaintiffs; and on the 17th of October V. Brothers indorsed on it an assignment to plaintiffs, and they brought an action upon it to recover for the loss of the seed in the lighter:

Held, that the plaintiffs could not recover. The policy was not expressly agreed to be assigned to plaintiffs by the sold-note; and no such intention could be inferred from the terms of the note, inasmuch as it was necessary that V. Brothers should keep the policy for their own protection until right delivery of the cargo. When the seed was put on board the lighter employed by plaintiffs, the seed was delivered to plaintiffs, and V. Brothers' interest ceased and the policy lapsed; and the subsequent assignment by V. Brothers to plaintiffs was, therefore, of no avail under 31 & 32 Vict. c. 86, s. 1.

CASE stated by consent after issue joined.

1, 2. The action is brought to recover £77 4s., with interest on a policy of insurance.

3. The plaintiffs carry on the business of seed crushers at Stockton-on-Tees, one of the ports of the United Kingdom, and have a landing-wharf there; and the defendants carry

on, at Athens, in the kingdom of Greece, the business of marine insurance on ships *and cargoes, and have also [250 offices and a local board of direction in London for conducting and carrying on such business.

4. On the 24th of November, 1871, Vagliano Brothers insured with the defendants a cargo of 2,950 chetwerts of linseed belonging to them, of the value of £6,200, for the sum of £1,500, at a premium of £52 10s., which Vagliano Brothers then paid to the defendants, the linseed then being on board the brig Fanny at Constantinople, for a voyage from Constantinople to a port of call and discharge in the United Kingdom to be named, including all risks of craft or lighters to and from the said brig, each lighter and craft being considered as if separately insured, the policy of insurance being expressed to be with Vagliano Brothers and their assigns.

5. The linseed had been duly shipped by Vagliano Brothers on board the brig, which then commenced the voyage in conformity with the terms of the policy, under a bill of lading dated the 29th (10th) of November, 1871, whereby the linseed was to be delivered at a safe port in the United Kingdom unto Vagliano Brothers or their assigns.

6. Whilst the brig was still on her voyage, Edwards & Co., who then acted as the agents of Vagliano Brothers in England, on the 17th of February, 1872, sold to the plaintiffs the cargo of linseed.

The following are the material parts of the sold-note:

“London, 17th February, 1872.

“Sold this day to the North of England Pure Oil-Cake Company, Limited, the following Taganrog linseed, viz., the cargo per Fanny, consisting of about 2,448 quarters, and now at Scilly, at 62/3 (sixty-two shillings and three pence) per 424 lbs. The seed is to be delivered at destined port in sound merchantable condition, and to be worked in thirteen days, and paid for in fourteen days from being ready for delivery by cash, less 2½ per cent. discount, or at seller's option, on handing shipping documents, less interest at 5 per centum per annum. . . . The vessel to go to any safe floating port in the United Kingdom. Should the whole or any portion of the above-named seed be sea or otherwise damaged, the same is to be taken with an allowance, which, together with any dispute arising out of this contract, shall be settled by arbitration in London; and should any portion of it be found damaged equal *to 15 per cent. on the [251 above price, such seed shall be taken as part of the con-

1875

North of England Oil-Cake Co. v. Archangel Insurance Co.

tract at the fair valuation of the day, to be fixed by the arbitrators."

7. The plaintiffs ultimately paid Vagliano Brothers, through Edwards & Co., the price of the linseed in cash, less 2½ per cent. discount, in conformity with the sold-note. ⁽¹⁾ On the 21st of February, 1872, Vagliano Brothers indorsed the bill of lading to the order of Messrs. Edwards & Co., who indorsed the same to the plaintiffs. The sellers of the cargo did not exercise their option mentioned in the contract note.

8. The plaintiffs duly notified Stockton-on-Tees (being a safe floating port within the terms of the policy) as the destined port of discharge of the cargo; and on the 26th of February, 1872, the brig duly arrived at the port with her cargo then intact.

9. The cargo was landed by means of public lighters employed by the plaintiffs to unload the cargo from the brig and to land the same at the plaintiffs' wharf. The employment of the lighters was within the terms of the policy, and was necessary for unloading and right delivery ashore of the cargo.

10. On the 28th of February, 1872, one of the lighters filled with part of the cargo arrived safely alongside of the plaintiffs' wharf, and was there sunk by perils within the terms of the policy, and thereby the same was partly lost and partly damaged.

11. The above-named loss occurred when a part only of the cargo had been discharged, and before the plaintiffs had paid the price of the cargo.

12. On the 4th of March, 1872, Vagliano Brothers made a claim on the defendants for the loss of the linseed in the lighter, and on the 5th of March, 1872, claimed and received from them a sum of money as return of premium, on the ground that the brig had arrived at Stockton-on-Tees. They retained the same, and no demand for the same has ever been made by the plaintiffs. This return of premium is indorsed on the policy; such return of premium does not, by the usage at Lloyd's, preclude the assured from afterwards claiming a loss upon the policy, if any loss has in fact occurred.

252] *13. On the 11th of May, 1872, a claim for £77 4s. in respect of the loss was made by Vagliano Brothers and was indorsed on the policy.

14. The policy was in June, 1872, handed over to the plaintiffs by Vagliano Brothers, and on the 17th of October,

⁽¹⁾ The date of the payment nowhere appeared in the case.

1872, Vagliano Brothers indorsed on the policy an assignment of it by them to the plaintiffs.

15. The court is to have power to draw inferences.

- The question for the opinion of the court is, whether upon the above facts the plaintiffs are entitled to recover from the defendants the said loss.

Butt, Q.C. (with him *Bohn*), for the plaintiffs: By 31 & 32 Vict. c. 86, s. 1, a policy of insurance can now be assigned so as to enable the assignee to sue in his own name, and this assignment may be made after the loss: *Lloyd v. Fleming*. (') The property in the cargo passed to the plaintiffs on the execution of the sold-note, and this, it is to be observed, was a contract made in London for the sale of a cargo at sea. In 1 Arnould on Marine Ins., p. 106, 4th ed., it is said: "When a floating cargo (i. e. a cargo at sea) is sold in London, it is generally on what are called the 'London floating conditions,' which comprise the delivery over to the purchaser for his benefit of the policies which have been effected on the cargo, the understanding being that it is insured to the full value, the price paid being all the higher, to include the amount paid by the vendor for insurance. . . . Where a cargo of wheat, still afloat, was sold at a depreciated price, and the vendor indorsed over the policy for so much only as would cover the depreciated price, being part merely of the sum insured in a valued policy, it was held as a matter of construction on the bought-note, taken in connection with the existence of the policy at the time of the contract, that the buyer was entitled to the policy for the full sum at which the wheat was originally insured under it," citing *Ralli v. Universal Marine Insurance Co.* (") *Prima facie* it would be an unreasonable construction of the contract of sale of a cargo exposed to sea risks and covered by a policy of insurance, that the vendor in- [253 tended to absolve the underwriters and allow the policy to drop. Payment in exchange for "shipping documents" always includes any policy existing, and in some cases it may be a question whether a vendor is not bound to tender a policy sufficient to cover all the cargo, though such does not exist: *Tanvaco v. Lucas* (').

[QUAIN, J., referred to *Powles v. Innes* (').]

When the interest is assigned the policy drops, but it will not drop so long as any interest remains in the vendor.

(') Law Rep., 7 Q.B., 299.

(*) 1 B. & S., 185; 30 L. J. (Q.B.),

(*) 2 J. & H., 159; 4 De G., F. & J., 1; 234; in error, 3 B. & S., 89; 31 L. J., 81 L. J. (Ch.), 207, 313.

(Q.B.), 296.

(4) 11 M. & W., 10.

1875

North of England Oil-Cake Co. v. Archangel Insurance Co.

[LUSH, J.: The plaintiffs took delivery by sending their lighters, so that as soon as the linseed was on board the lighter the vendors' interest had ceased.]

Only in that particular part; and the vendors had an interest up to the date of handing over the policy by reason of their unsettled account for the cargo. There is no case that part of a policy can be assigned. [He also referred to *Hurry v. Royal Exchange Assurance Co.* ⁽¹⁾; *Ebsworth v. Alliance Insurance Co.* ⁽²⁾; *Anderson v. Morice* ⁽³⁾.]

W. Williams, Q.C. (with him Crompton), for the defendants: There is nothing in the contract of sale to imply that the policy was to be assigned for the plaintiffs' benefit; and if so, on the delivery of the goods, Vagliano Brothers' interest was at an end, and the policy dropped. This is not the case of a sale as on London floating conditions; the insurance in those cases is taken into consideration in the price. Here the sellers' interest under the policy continued till the delivery, for they were only to be paid on delivery of the cargo; consequently it is clear that the policy was not intended to be assigned for the plaintiffs' benefit.

Butt, Q.C., in reply.

COCKBURN, C.J.: We are agreed on one point, which entitles the defendants to judgment, viz., that, the policy not having been assigned until after the interest of the assignors had ceased, an effective assignment was impossible. If there [254] had been a stipulation *in the contract of sale that the policy should be assigned for the benefit of the plaintiffs, the vendees, it might have been otherwise; but not only is there no express stipulation to that effect, but, the implication from the nature of the contract is the other way. This is not like the common case of the sale of a floating cargo, where the seller parts with and the buyer takes at once the property, and all risks. In such a case, the policy, according to the established practice, passes as part of the shipping documents, and on assignment the vendee can sue upon it in case of loss. And there is no hardship in this on the insurers, because they insured the safety of the cargo to the end of the voyage, and it is immaterial to them in whom the interest vests at the time of the loss; and there is great convenience in the practice, as it obviates the necessity of the vendee getting a fresh policy and facilitates the sale of cargoes at sea. But this is not an out-and-out sale; on the contrary, although the sale might at once transfer the prop-

⁽¹⁾ 2 B. & P., 430.

⁽²⁾ Law Rep., 8 C. P., 596.

⁽³⁾ Law Rep., 10 C. P., 58.

erty to the vendees, yet an essential term of the agreement was that payment was only to take place on the right delivery of the cargo, so that the interest, a substantial real interest, remained in the sellers. If the cargo had perished at sea, the sellers would not have got one shilling; therefore until delivery to the plaintiffs, the buyers, the interest in the policy remained in the sellers. But on the delivery to the plaintiffs the sellers became entitled to payment and their interest in the policy ceased; and the policy was at an end. Consequently, although an actual assignment may be good after the loss, in the present case the assignment was not in consequence of a previous agreement before the policy dropped, and therefore the sellers had no interest in the policy, and nothing to assign.

LUSH, J.: I am of the same opinion. It is clear the contract of sale did not confer any interest in the policy on the plaintiffs; and the mention of shipping documents in such a contract would not of itself without more include the policy. If, then, the policy were not agreed to be assigned before the sellers' interest ceased by the delivery on board the lighters, an assignment after that interest had ceased could not create an interest in the plaintiffs. The *right to [255 sue in the original owner's name was by virtue of the interest which had been agreed to be passed from the one to the other; and the right given by the statute to sue in the assignee's own name only applies in cases where he could have sued in the vendor's name.

QUAIN, J.: I am of the same opinion. *Powles v. Innes* (') is directly in point for the defendants. On the sale of a thing insured no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly. The only question, therefore, which it is necessary to decide in the present case is, whether there is any stipulation express or implied in the sale-note from Vagliano Brothers to the plaintiffs. Express stipulation is out of the question; and none can be implied from the nature of the contract. On the contrary, it was a mere accident that the plaintiffs took delivery by lighters from the ship's side; this was clearly not anticipated at the time of the contract. The mention of the delivery of "shipping documents" can have no application to the policy in such a case. There was, therefore, no policy contemplated that should be kept alive for the benefit of the vendees, while the interest in the vendors remained; and the law is clear that a

(') 11 M. & W., 10.

1875

Mitchell v. Lancashire and Yorkshire Railway Co.

subsequent assignment cannot operate to give the assignee an interest in the policy.

Judgment for the defendants.

Attorneys for plaintiffs : *Sharp & Ullithorne.*

Attorneys for defendants : *Courtenay & Croome.*

[Law Reports, 10 Queen's Bench, 256.]

April 22, 1875.

256] *MITCHELL and Others v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway Company—Carriers—Warehousemen—Advice-note : we hold "not as Common Carriers but as Warehousemen, at Owner's sole Risk, and subject to usual Warehouse Charges."

The plaintiff was consignee of some flax sent by the defendants' railway to N. station. On its arrival at N. station, defendants sent to plaintiff an advice-note of its arrival, requiring him to remove it, and stating that they, defendants, would hold it "not as common carriers but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges."

Soon after the receipt of this notice, the plaintiff went to the station and removed two tons of the flax, but left the rest at the station for more than two months. There were no warehouses at the station, and the flax remained on open ground insufficiently covered, and became damaged by wet.

In an action for the damage it was admitted that, if the defendants were bound to take reasonable care of the flax, they had not done so :

Held, that, treating the advice-note acquiesced in by the plaintiff as a contract, the terms of it, taken altogether, did not exempt the defendants from liability for negligence to the extent that they would be liable as warehousemen or bailees for hire; and that they were therefore liable for the damage.

FIRST COUNT, that the defendants received and held, as warehousemen for the plaintiffs, sixty bags of tow and flax to be taken care of by the defendants for reward in that behalf; that defendants took so little care and acted so negligently about the premises that the tow and flax was wetted and spoiled.

Second count, that the tow and flax was held by the defendants as warehousemen at plaintiffs' sole risk and subject to the usual warehouse charges, yet defendants were guilty of gross and active negligence, and did not take the care of the tow and flax which they might reasonably have been expected to take if the tow and flax had been their own, and acted so carelessly, &c., that the tow and flax were wetted and injured.

Third count, that the defendants were possessed of the tow and flax as warehousemen, and that it was in a yard covered with tarpaulin, and so protected from the rain,

and the defendants negligently removed the tarpaulin, whereby, &c.

Pleas 1—3, to each count respectively, that the defendants did not receive the tow on the terms alleged. 4. Not guilty.

*Issue joined.

[257

On the trial at the Liverpool Spring Assizes, 1874, before Denman, J., it appeared that about the 25th of July, 1873, sixty bags or bales of flax or tow arrived at the defendants' Newchurch station by their railway, consigned to the plaintiffs, who are felt manufacturers in that neighborhood; and the next day the defendants' agent forwarded to the plaintiffs the following advice-note.

"Lancashire and Yorkshire Railway, Newchurch Station,
"Advice of Goods. July 26, 1873.

"Messrs. Mitchell,—The undermentioned goods, consigned to you, having arrived at this station, I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company, not as carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges in addition to the charges now advised. When you send for the goods please to send this note. . . .

"For the Lancashire and Yorkshire Railway Company.

"J. Taylor, Agent.

"Sixty bags flax," weight, freight, &c., carriage so much. Paid out so much. "Total to pay, £15 11s. 1d."

Nine bales of the tow were taken by the plaintiffs' carter at once on the 25th of July, and soon after the receipt of the notice one of the plaintiffs went down to the station and ordered some more (two tons in all) to be removed. There were no warehouses at the station, and the plaintiff saw how the tow was stacked; at that time the weather was fair. In consequence of the tow not being according to sample, and not being suitable for the plaintiffs' manufacture, they refused at first to accept it, and told the defendants' manager they were not the owners; afterwards the plaintiffs arranged to take it. But when it was removed from the station (which was in the second week in October) it was found to be completely spoilt by wet. The tow had been stacked in the open air, and it had not been placed, as it ought to have been, on planks or something to raise it from the wet ground, and the tarpaulins put over it were insufficient and let the rain through. It was admitted that, if the defendants were bound to take reasonable *care in keeping the [258 tow, they had not done so; and a verdict was returned

1875

Mitchell v. Lancashire and Yorkshire Railway Co.

for the plaintiffs for £115, with leave to move to enter a verdict for the defendants, if there was no evidence on which the jury could properly find for the plaintiffs.

A rule having been obtained accordingly,

Crompton showed cause: First, there was ample evidence of a contract between the plaintiffs and defendants; and the question is what the terms of the advice-note mean. "Not as carriers but as warehousemen, at owner's sole risk" means, We will be liable as warehousemen only for negligence, and all other risks must be taken by the owner. But even if "at owner's sole risk" be interpreted to absolve the defendants from the obligation to take any care whatever in keeping the goods, still it would not absolve them from taking proper care in the original stowage; and the flax was never properly stored at all.

[FIELD, J.: The plaintiffs' contention is that there was a duty, which the defendants could not get rid of when they received the goods as carriers, to put them into a proper place and position.]

Yes; and therefore that they are not protected from liability, even if the court should interpret this note as absolving them from all liability for negligence in the keeping of the goods. "At a person's own risk," has received an interpretation in *McCawley v. Furness Ry. Co.* (¹), as absolving the carrier from all liability for negligence; but that was the case of a passenger, and is not in point as to the interpretation of this notice. The same may be said of *Gallin v. London and North Western Ry. Co.* (²)

[BLACKBURN, J.: I do not see how those cases apply here.]

In *D'Arc v. London and North Western Ry. Co.* (³), "at owner's sole risk" was held not to relieve the carrier from liability for the consequence of their delay in the delivery; following *Robinson v. Great Western Ry. Co.* (⁴), *Phillips v. Clark* (⁵) is to the same effect. And so are *Ohrloff v. Briscall* (⁶), and *Czech v. General Steam Co.* (⁷) All these 259] cases show that, where a company are **prima facie* liable, as carriers or otherwise, for want of care, they cannot get rid of their liability for negligence except by the use of the clearest language possible.

Herschell, Q.C., in support of the rule: The original contract was complete and at an end on the arrival of the goods at their destination and the receipt by the plaintiffs of the

(¹) Law Rep., 8 Q. B., 57.

(²) Ante, p. 212.

(³) Law Rep., 9 C. P., 325.

(⁴) 35 L. J. (C.P.), 123.

(⁵) 2 C. B. (N.S.), 156; 26 L. J. (C.P.), 168.

(⁶) Law Rep., 1 P. C., 231.

(⁷) Law Rep., 3 C. P., 14.

notice to remove them. And a new contract was created by the notice on the plaintiffs leaving the goods after they were informed of the terms on which the defendants held them. The construction put by the plaintiffs on the notice gives no force whatever to the words, "at the owner's sole risk," for "not as carriers but as warehousemen" would leave the defendants liable for negligence or want of care. "At owner's sole risk," must therefore mean to relieve them from all liability, but with a right to claim rent for the space occupied in the storage of the goods. *McCawley v. Furness Ry. Co.* (*) is directly in point. The only thing a carrier of passengers is liable for is negligence, and "at passenger's sole risk" was therefore interpreted to absolve the carrier from all liability; so a warehouseman is only liable for negligence, that is, he must take reasonable care, and consequently "at owner's sole risk," must be interpreted to absolve the warehouseman from the only thing for which he would be liable.

[BLACKBURN, J., referred to *Cairns v. Robins* (*).

FIELD, J., referred to *Great Northern Ry. Co. v. Swaffield* (*).]

One of the plaintiffs came to the station in August and saw how the tow was stacked, and he must be taken to have acquiesced. The defendants wanted the tow to be removed, and it was left with them against their will; there is therefore nothing unreasonable in their saying, "We do not want the goods to remain, we would much rather get rid of them, and we will be liable for nothing. The goods remain, if they are not removed, at the owner's sole risk; but as we are forced to act as warehousemen, we shall charge rent for the space occupied." Secondly, the plaintiffs repudiated being owners, and they cannot afterwards turn round and as owners charge the defendants for damage suffered in the interval.

260] *BLACKBURN, J.: I think this rule should be discharged. I take it the law is very clear to this extent, that where a carrier receives goods to carry to their destination with a liability as carrier (except so far as that duty is qualified by exceptions), he may be said to be an insurer. The goods are then to be carried at the risk of the carrier to the end of the journey, and when they arrive at the station to which they were forwarded, the carrier has then complied with his duty when he has given notice to the consignee of their arrival. And after this notice, and the consignee does

(¹) Law Rep., 8 Q. B., 57.

(²) 8 M. & W., 258.

(³) Law Rep., 9 Ex., 132.

1875

Mitchell v. Lancashire and Yorkshire Railway Co.

not fetch the goods away, and becomes in *mora*, then I think the carrier ceases to incur any liability as carrier, but is subject to the ordinary liability of bailee. There are several cases in which the question has been very much discussed as to when a carrier's liability ceases as an insurer, and his liability is changed into that of warehouseman. Such, for instance, as *Bourne v. Gatliffe*(¹) and *Cairns v. Robins*(²). In the first a fire had taken place after the goods had been put from on board defendant's ship on to a wharf, and the liability of the carrier was held still to continue. In the other, a similar case, there having been delay in the owner, the carrier was still held liable for the loss of the goods as bailee for reward. But I do not think there has been any case decided to this extent, that, because the owner of goods was idle and blameable for leaving them in the carrier's hands, therefore he as bailee held them under no responsibility whatever. I think in this case the railway company in holding these goods could have charged warehouse rent, and that being so, I think there can be no doubt that *prima facie* there was a liability in them as bailees for reward. The liability of an ordinary bailee is to take ordinary and reasonable care. And if the defendants in this case are under that liability, there is ample evidence that they did not do that. There is ample evidence on which a jury might find that they did not use ordinary care.

Mr. Herschell has taken two points, and I will deal with the second first. He says: The plaintiffs in the first instance said, "We will not have these goods because they do not fulfil our order; we are not the owners of them; we will not 261] take them; *you do not hold them for us, but for the consignors;" and then afterwards, when they find out that they were the owners of the goods, they said, "We do take them." And Mr. Herschell has argued that, having once said that, they cannot sue for injury to the goods between the time they said, We are not the owners but the consignors, and the time they found out the mistake and said they would take them. I must say I cannot agree with that argument. The obligation of the railway company was what they themselves point out, namely, to hold them for the owner of the goods; and although the plaintiffs may have been mistaken in saying, "We are not the owners of the goods," yet when they found out they were, and took them, they were entitled to say, "During the time of keeping them, you were under an obligation to us, the owners of the goods, to take care of

(¹) 4 Bing. (N.C.), 314; 3 Man. & G. 643, (²) 8 M. & W., 258.
in Ex. Ch.; 11 Cl. & F., 45, in H. L.

them; and you have neglected to do that, and it is we who have sustained the damage, and we now seek to recover it." That seems clear. It might have been that during the interval damage would occur to the goods necessarily from mere lapse of time, such, for instance, as a fall in price, or in the case of fruit which had become rotten, or articles that required to be brought very fresh, such as vegetables and fish, which in a very few days would become stale. I think in all these instances the damage would arise from the owner's fault; but this is not a case of that sort at all. These were goods which could be taken care of and remain safely at the station; but not being taken care of at all, but allowed to remain unprotected from the rain, they get drenched with rain, and suffer damage for the want of being taken care of, and not from the mere delay. Now, that being so, I take it the plaintiffs are entitled to say, "Whatever liability you incur, you incur to us."

- Mr. Herschell says, secondly, that the defendants' liability was none at all, because, when the goods arrived, the defendants send this notice. [The learned judge read the notice.] Now, the plaintiffs' attention having been drawn to this notice, I think Mr. Herschell is right in saying that there is evidence that when one of the plaintiffs came to take away part of the goods, he, as the consignee, consented to the goods being held by the defendants, not as common carriers, but as warehousemen, at the owner's sole risk. What we have to consider is, whether the defendants can *have the benefit of receiving warehouse rent without [262 any liability whatever, for that is what Mr. Herschell's argument came to. We are to be paid warehouse rent, and keep them as warehousemen, but we are not to be bound to take any care of them at all. It is but reasonable to suppose that if the defendants meant to express any such thing as that, it should have been expressed clearly and distinctly. It is the company's own language, and must be taken as much as possible against them. I do not think that the words "at owner's sole risk," applied to such a case as this, mean that the company are to hold the goods, not as common carriers, but as warehousemen, and subject to warehouse charges, but that none of the liability of warehousemen is to be attached. I think that the words of that note mean to point out that they would hold them as warehousemen, and therefore they would be bound to take care of them; and at the owner's risk so far as this, that they did not hold as carriers with a liability (with the exception of lightning and one or two excepted perils) as absolute insurers.

1875

Mitchell v. Lancashire and Yorkshire Railway Co.

In the case of *McCawley v. Furness Ry. Co.* ⁽¹⁾ we had to consider, not the meaning of the terms of the contract, but the plea, and the plea gave us the legal effect of the contract. There a drover went gratis with cattle, on the terms that he was to go at his own risk (which was stated in the plea), and taking that as the legal effect of the contract, we thought, and thought quite rightly, that if any accident happened from the negligence of the servants of the company, the company were not responsible. This is a different contract, and it is one upon which I cannot put such a construction as that. On these grounds I think the rule should be discharged.

FIELD, J.: I am of the same opinion upon both points. With reference to the principal point, it seems to stand thus: The defendants were originally under a contract to carry these goods to Newchurch station, and I take it their duty was to do that which they did; and on the arrival of the goods at the station they gave the consignees notice of it, and then it became the consignees' duty to send for them [263] within a reasonable time. During that *reasonable time it might be a question whether the company held the goods as carriers or warehousemen. In order to prevent all doubt, the company adopted the usual course, that is, they gave notice to the consignees, "Your goods have come, you must send for them and fetch them away as soon as possible." And then they go on to say, "If you do not do that, we give you notice that we will no longer be liable as carriers, but we hold them as warehousemen." Now, if the notice had stopped there, of course there would have been no question at all about it, because, even if the defendants were not bound to hold the goods, they did, in point of fact, hold and retain the goods as bailees, and they did, in point of fact, hold and retain them on the terms of their own notice; therefore the only question is as to what is the true construction of their own advice-note. Now undoubtedly the words "at owner's sole risk" do create a difficulty of construction. I must confess, for myself, that I do not at present see what element that expression provides for looking at the exact nature and character of the warehousemen's liability; but then I am bound to look at the whole contract, and read it altogether; and I find these words "at owner's sole risk" follow affirmative and positive words describing what the obligation is under which they came, and in what character they held the goods, viz., as warehousemen. They say, We will not hold them any longer as carriers, we will

(1) Law Rep., 8 Q. B., 57.

get rid of those risks by which carriers are very often harassed, but we will hold them under a known character and definition as warehousemen. I cannot hold, reading the words "at owner's sole risk" in connection with these other words, that that frees them from liability as warehousemen to take reasonable care of the goods, but only from the liabilities of carriers or insurers. I am therefore obliged to come to the conclusion that the defendants became liable as warehousemen, and in that respect they are liable. On the other point, I agree with my learned Brother.

Rule discharged.

Attorneys for plaintiffs: *Milne, Riddle & Mellor, for Hargreaves & Knowles, Newchurch.*

Attorneys for defendants: *Clarke, Woodcock & Ryland, for Grundy & Co., Manchester.*

[Law Reports, 10 Queen's Bench, 264.]

May 11, 1875.

***REED V. THE KILBURN CO-OPERATIVE SOCIETY. [264]**

Money lent for Six or Nine Months—Option in Borrower.

Plaintiff lent defendants £50 under an agreement: "Defendants agree to borrow from plaintiff the sum of £50 at the rate of £6 per annum, and plaintiff agrees to lend defendants the above sum for the term of nine or six months";

Held, that the option of making it a loan for six or nine months was in the defendants, the borrowers.

DECLARATION for money lent.

Plea: never indebted. Issue joined.

At the trial before Cleasby, B., at the Surrey Summer Assizes, 1874, it appeared that the plaintiff had lent £50 to the defendants in November, 1873, under the following agreement: "Kilburn Co-operative Society, Limited. 19 Nov., 1873. We hereby agree to borrow from C. Reed the sum of £50, at the rate of £6 per annum; and the said C. Reed agrees to lend the said society the above sum for the term of nine or six months" [signed by the officers of the company and by the plaintiff.]

After the six months had elapsed, but before the nine months had elapsed, the plaintiff demanded the money, and commenced the present action.

In answer to a question by the judge the jury found that the option was in the plaintiff; and the verdict was entered for the plaintiff, with leave to move to enter the verdict for

1875

Hinde v. Liddell.

the defendants, if the court should be of opinion that on the above agreement the option was in the defendants.

A rule was obtained accordingly to enter the verdict for the defendants on the ground that the credit had not expired when the action was brought.

Pearce showed cause: He contended that the option was in the plaintiff.

[BLACKBURN, J.: Where it is not said at whose option one of two alternatives is to take place the rule of law is, that the option is in the party who is to do the first act; here the borrower is to do the first act by paying. *Price v. Nixon* (') is directly in point.]

265] *There the lender had not, as here, exercised the option, but had let the six months pass.

[COCKBURN, C.J.: It is clear the alternative is put in for the benefit of the borrower. The lender is master of the situation, and could impose any terms in the first instance.

QUAIN, J.: A lease for seven, fourteen, or twenty-one years, without saying at whose option, is at the option of the lessee (').]

F. Turner and *F. H. Pain*, in support of the rule, were not called upon.

Per Curiam (Cockburn, C.J., Blackburn, Mellor and Quain, JJ.)

Rule absolute.

Attorneys for plaintiff: *Tilley & Liggins.*

Attorney for defendants: *W. H. B. Pain.*

(') 5 Taunt., 338.

(*) See *Dann v. Spurrer*, 3 B. & P., 399.

See 2 Chitty on Contracts (11th Am. ed.), 1061; 2 Pars. on Cont. (6th ed.), 651, 657.

[Law Reports, 10 Queen's Bench, 265.]

April 21, 1875.

HINDE V. LIDDELL and Others.

Contract, Breach of, in Delivery of Goods—Measure of Damages.

The defendant contracted to supply to plaintiff 2,000 pieces of grey shirtings, to be delivered on the 20th of October, certain, at so much per piece, the defendant being informed that they were for shipment. Shortly before the 20th of October, defendant informed plaintiff that he would be unable to complete his contract by the time specified, on which plaintiff endeavored to get the shirtings elsewhere, but, there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. The plaintiff, therefore, in order to ship according to his contract with his subvendee, procured 2,000 pieces of other shirtings of a somewhat superior quality, at an increase of price, which the subvendee accepted, but paid no advance in price to plaintiff. The plaintiff sought to

recover against defendant for the breach of his contract, the difference between what he paid for the substituted shirtings and the defendant's contract price. It was admitted at the trial that the shirtings which plaintiff bought were the nearest in price and quality that could be got by the 20th of October; and the jury returned a verdict for the amount claimed:

Held, that there being no market for the article contracted for, the measure of damages was the value of it at the time of breach; and that the plaintiff having done the best thing he could, was entitled to recover the difference in the price.

Borries v. Hutchinson (18 C. B. (N.S.), 445, 465), followed.

DECLARATION for not supplying certain grey shirtings according to contract.

*Plea: payment of £25 into court.

[266

Replication, damages *ultra*. Issue joined.

At the trial before Field, J., at the last Manchester Spring Assizes, it appeared that the defendants agreed to supply the goods in question under the following order, which the plaintiff gave to them, at the same time informing them that the goods were for shipment:

"Messrs. Liddell & Co. Manchester, Sept. 15, 1874.

"We note below particulars of contract made to day with you by us, and beg your attention to all the conditions of the same. We shall thank you to attend most particularly to delivery, as stated below

"2,000 grey shirtings [giving the dimensions, &c.], price, 9s. 10½d., delivery October 20th, certain.

"Yarns exactly like the pattern of No. 18 and 21 given us to-day.

"Heading to pattern herewith.

"(signed) pro Robert Hinde & Co.

"R. Rayner."

In order to supply this order the defendants had to get the goods manufactured according to a sample of shirting produced to and left with them for that purpose. They had placed the sample in the hands of a manufacturer for that purpose, but on the 15th of October they informed the plaintiff that they could not execute the order by the time specified. Upon this the plaintiff at once went into the market in search of goods of the same description and quality as those contracted for by the defendants, he, the plaintiff, being under contract with his vendee to ship the goods by first steamer in November. The plaintiff was unable to find goods of the same quality in stock, or to get them manufactured either at the same price or by the 20th of October, the time at which they were contracted to be delivered. He did, however, succeed in obtaining grey shirtings near the quality contracted for, although somewhat superior, and for that he had to pay an advanced price; and he purchased

1875

Hinde v. Liddell.

them and delivered them to his vendee in performance of his contract, but without obtaining any advance in price from him, or any advantage whatever from the superior quality of the goods. It was admitted by the defendants that the 267] plaintiff used every reasonable effort to *obtain cloth of the quality contracted for, and that the shirtings obtained were the nearest in quality and price that could be got in the market to be delivered by the 20th of October. The extra price over that contracted for with the defendants was 16½d. per piece, and amounted to the sum of £137 10s., and it was to recover this sum that the action was brought.

There was no difference between the 15th of September and the 20th of October in the market price of yarns for the manufacture of goods of the description contracted for, and the £25 paid into court was admitted to be sufficient to cover all damages, unless the plaintiff was entitled to recover the whole or part of the £137 10s.

The only fact in dispute was as to how much the goods bought by the plaintiff exceeded in value those contracted for.

This question was, by consent of the parties, the only one left to the jury, and they found that the shirtings bought by the plaintiff were 10½d. per piece better in quality than those contracted for by the defendants, which difference amounted to £87 10s.; and the defendants contended that, even if the plaintiff could recover any part of the increase in price, they were entitled to deduct £87 10s., the plaintiff having obtained goods of a better quality to that extent.

The learned judge ruled that the plaintiff was entitled to recover the whole amount claimed, and directed a verdict for the plaintiff for £137 10s., with leave to move to enter the verdict for the defendants, or to reduce the damages to the sum of £50.

Jordan moved accordingly: The defendants had no notice of the plaintiff's sub-contract; he is therefore not entitled to any damages arising from the existence of this contract: *Williams v. Reynolds* ⁽¹⁾. The general measure of damages in such a case is the difference between the market price and the contract price. Here the price would have been the same in the market, as the price of the yarns had not changed.

[BLACKBURN, J.: But there was no market for this particular description of shirtings, and therefore no market price; in such a case the measure of damages is the value of the thing at the time of the breach of contract, and that 268] must be the price of the *best substitute procurable.

(1) 6 B. & S., 495; 34 L. J. (Q.B.), 221.

Borries v. Hutchinson ⁽¹⁾ is directly in point. How does this differ from the case of a carrier who fails to carry a passenger to a given place, in which case the passenger has been held over and over again to be entitled to take the best substitute in the shape of a conveyance he can get, no matter that it costs much more than the fare ?]

The measure of damages is different in the case of a carrier and a contract to supply goods.

[BLACKBURN, J.: Not so. The carrier contracts to supply the conveyance, and fails by not carrying his passenger.]

Secondly, the defendants are, at all events, entitled to reduce the verdict by £87 10s., the excess in quality of the shirtings the plaintiff obtained over those which the defendants contracted to supply. It has been held that a plaintiff is not entitled to make a profit out of a defendant's breach of contract; and here the plaintiff might have resold the next day at an advance of price.

[FIELD, J.: The plaintiff bought the shirtings to enable him to fulfil his contract, and he got no advance in price from his vendee.]

COCKBURN, C.J.: I am of opinion that there should be no rule. The question is whether, when one person orders and another undertakes to supply goods which are not to be had ready-made in the market, but have to be first manufactured, the latter may break his contract at the risk of having to pay nominal damages only, or whether he must pay such damages as usually arise in the course of mercantile transactions of the kind, where he neglects to fulfil his contract on the given day. Here the defendants inform the plaintiff that they will be unable to supply and deliver the shirtings; the plaintiff immediately goes over Manchester and tries, but cannot get shirtings like those he ordered, but he gets the nearest to them that he can, and so avoids what would otherwise have been the consequence of his not fulfilling his contract of shipment. In so doing he incurs a loss by having to pay a larger price with no advance from his vendee. The course the plaintiff pursued was right and reasonable; he would have had to pay larger damages had he not fulfilled his contract, and so by giving this advance of price he did what was the best for all parties. He is, therefore entitled to the damages he claimed.

*BLACKBURN, J.: I am of the same opinion. This [269 was a contract by which the defendants undertook to get manufactured and deliver a quantity of shirtings on a certain day; they did not fulfil the contract, and the general meas-

⁽¹⁾ 18 C. B. (N.S.), 445, 465; 34 L. J. (C.P.), 169.

1875

Hinde v. Liddell.

ure of damages in such a case would be the value of the thing on the day when the contract ought to have been fulfilled, and in general the market price gives this value; but when the thing cannot be got in the market, but must be previously ordered and manufactured, if you cannot have the market price, still the plaintiff is entitled to more than nominal damages. In *Elbinger Actien-Gesellschaft v. Armstrong* ⁽¹⁾, which was an action for not delivering castings according to tracings which could not be got ready made, it is said in the judgment of the court: "It is no doubt quite settled that, on a contract to supply goods of a particular sort, which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach. Where, from the nature of the article, there is no market in which it can be obtained, this rule is not applicable; but it would be very unjust if, in such cases, the damages must be nominal: and there are several decisions showing that such is not the law. In *Bridge v. Wain* ⁽²⁾, where the contract was to supply scarlet cuttings in China, and the articles supplied were not scarlet cuttings, Lord Ellenborough ruled that the plaintiffs were entitled to the value of scarlet cuttings in China. In *Borries v. Hutchinson* ⁽³⁾, where the action was to recover damages for delay in delivering caustic soda, which it was admitted was an article which is not kept in stock, so as to be capable of being at any time bought in the market, and, consequently, there was no ascertainable market price; Willes, J., in that case, says: 'In ordinary cases, where the article is one which can be bought in the market, the proper measure of damages for a breach of contract to deliver is the difference between the contract price and the market price on the day of the breach. . . . There was no market price to which resort could be had as a test of damage. We must, therefore, ascertain what was the value of the article contracted for at the time when it ought to have been and at the time when it actually was delivered.'" In the present case, 270] *the goods were for a foreign market; and it was admitted that the only reasonable thing the plaintiff could do was to put himself in the same position as if the defendants had fulfilled their contract by obtaining a somewhat dearer article. I do not see on what principle it can be said that the plaintiff is not entitled to recover this difference in price. We do not decide anything as to what the effect of

⁽¹⁾ Law Rep., 9 Q. B., 473, 476.

⁽²⁾ 1 Stark., 504.

⁽³⁾ 18 C. B. (N.S.), 445, 465; 34 L. J. (C.P.), 169.

a notice of the plaintiff's sub-contract might have been. Under the circumstances, the value of the goods contracted to be supplied by the defendants at the time of their breach of contract was the price the plaintiff had to give for the substituted article.

MELLOR, J.: I am of the same opinion, and do not wish to add anything to what has been said by the other members of the court.

FIELD, J.: I am of the same opinion. The jury gave a verdict for £137 10s., the difference between the contract price and the price the plaintiff had to give for other shirtings. As soon as the defendants told the plaintiff that they could not complete their contract, the plaintiff did the best he could to find cloth of the same description; he was unable to do so, but he did find a number of pieces of another kind, which was the nearest in price and quality to be got. The plaintiff *bona fide* paid the increased price which he did not and could not have recovered from his vendee. It follows that he was entitled to recover this difference in the price as the damages which were the natural consequence of the defendants' breach of contract, and were what must have been in the contemplation of the parties when they made the contract. It is to be observed, that the defendants were told that the shirtings were for shipment; and even without this, the description of the article was such as made it known that it was not for wear in this country, but for export to a foreign market. The defendants not supplying the cloth at the given day, the plaintiff was entitled to get the best substitute he could. If he had derived any benefit from the advance in price, I should hesitate before I said he could recover the whole of the difference; but he derived no benefit whatever beyond being able to complete his contract with his vendee on the original terms upon which he had contracted.

Rule refused.

Attorney for defendants: *W. H. S. Watts, Manchester.*

1875

Robson v. North Eastern Railway Co.

[Law Reports, 10 Queen's Bench, 271.]

May 8, 1875.

271] *ROBSON V. THE NORTH EASTERN RAILWAY COMPANY.

Railway Company—Duty to Passenger on Alighting from Train—Substitute for Platform—Negligence.

Where a passenger by a railway is invited to alight at a spot where there is no platform, so that the usual means of descent are absent, the duty of the railway company not to expose the passenger to undue danger requires them to provide some reasonably fit and safe substitute; and, in the case of a female passenger, a jury may reasonably find that the company fails in this duty where the only means of alighting provided are the usual iron step and footboard, with no attendants to assist the passenger in alighting.

Plaintiff, a female, was a passenger by defendants' railway to B., a very small station; on the arrival of the train at the station, the engine and part of the carriage in which plaintiff was riding, were driven past the end of the platform which is short, and came to a standstill; the door of the plaintiff's compartment being beyond the end of the platform. Upon the train stopping plaintiff rose and opened the door, and stepped on to the iron step; she looked out and saw the station-master, who is the only attendant kept there, taking luggage out of or putting luggage into a van. She did not see the guard or any other railway servant, and she stood on the step looking for somebody to help until she became afraid of the train moving away; and, no one then coming, she tried to alight by getting on to the footboard; she had her back to the carriage, and she had hold of the door with her right hand, and got one foot on to the footboard, and whilst endeavoring to get the other foot on to the footboard she lost her hold of the carriage-door, and slipped, and fell, and was injured. She had a small bag on her left arm, and an umbrella and two small articles in her left hand, but nothing in her right hand. The judge having nonsuited the plaintiff on the above evidence, with leave to enter a verdict for the plaintiff:

Held, first, that there was evidence from which a jury might have properly found that the plaintiff was invited or had reasonable ground for supposing she was invited to alight by the company's servants; and that the defendants had failed in their duty towards the plaintiff, and had not provided a reasonable substitute for a platform.

Held, secondly, that the jury might not improperly have found that the expectation of being carried beyond the B. station was reasonably entertained by the plaintiff, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting; and that the defendants were therefore liable for the injury resulting from the plaintiff's act, which had been caused by their negligent breach of duty. And that the nonsuit was therefore wrong, and the verdict ought to be entered for the plaintiff.

DECLARATION for negligence in carrying the plaintiff as a passenger by defendants' railway.

Plea, not guilty. Issue joined.

At the trial before Archibald, J., at the Northumberland 272] *Summer Assizes, 1874, a nonsuit was directed, with leave to the plaintiff to move to enter a verdict for £100, if the court should think there was evidence of negligence for the jury. The facts are fully stated in the judgment.

A rule having been obtained, pursuant to the leave reserved,

April 22. *Herschell*, Q.C., and *Crompton*, showed cause. *Kay*, Q.C., in support of the rule.

The following cases were cited: *Bridges v. North London Ry. Co.* (¹); *Siner v. Great Western Ry. Co.* (²); *Foy v. London, Brighton and South Coast Ry. Co.* (³); *Cockle v. London and South Eastern Ry. Co.* (⁴); *Praeger v. Bristol and Exeter Ry. Co.* (⁵)

Cur. adv. vult.

May 8. The judgment of the court (Blackburn and Field, JJ.), was delivered by

FIELD, J.: This is an action brought to recover damages sustained by the plaintiff for personal injury caused, as she alleges, by the negligence of the defendants, who deny their liability.

The cause was tried before Archibald, J., at the Newcastle Summer Assizes, 1874, who held that there was no evidence of negligence, and directed a nonsuit, with leave to the plaintiff to move to enter a verdict for £100, "if the court should think that there was evidence of negligence;" and the rule in question was granted in pursuance of that leave.

The facts proved were that the plaintiff was a passenger by the defendants' railway to a small station called "Benton," and that on the arrival of the train at that station, the engine and the part of the carriage in which the plaintiff was riding were driven past the end of the platform, and came to a standstill, the door of the plaintiff's compartment being beyond the end of the platform. It appeared that upon the train stopping the plaintiff rose, and opened the door, and stepped on to the iron step; that she looked to see whether there were any railway servants about, and saw the *station-master taking luggage out of or putting luggage into the van, but she did not see the guard or any other railway servant, and she stood on the step looking for somebody to help her, until she became afraid of the train moving away, and no one then coming she tried to alight by getting on to the footboard, and in so trying, slipped her foot and fell down by the carriage side, and thus sustained the injury for which the action was brought. At the time she was trying to get on to the footboard she had her back to

(¹) Law Rep., 6 Q. B., at p. 394; 7 H. L., 218.

(²) Law Rep., 3 Ex., 150; 4 Ex., 117, in Ex. Ch.

(³) 18 C. B. (N.S.), 225.

(⁴) Law Rep., 7 C. P., 321.

(⁵) Law Rep., 7 C. P., at pp. 323-324.

the carriage. She had hold of the door with her right hand, and had got one foot on to the footboard, and it was whilst endeavoring to get the other foot on to the footboard that she lost her hold of the carriage-door, and slipped, and fell, she having at the time upon her left arm a small bag, and in her left hand a small empty basket, small quart case, and umbrella, but nothing in her right hand.

The station in question is a very small one, and the platform short, and the station-master is the only servant kept there.

The only question we have to deal with is, whether there was any evidence here upon which the jury, as men of ordinary reason and fairness, might properly come to the conclusion that the defendants were guilty of an act or acts of negligence which caused the accident. Now we think that the mere overshooting the platform is not such evidence: *Cockle v. London and South Eastern Ry. Co.* (1); *Lewis v. London, Chatham and Dover Ry. Co.* (2); and *Weller v. London, Brighton, and South Coast Ry. Co.* (3); but, in the present case, the train not merely overshot the platform, but the facts were such as to afford at least evidence that it had been brought to its final standstill, and that there was no indication of any intention existing in fact or evinced to back it, and no warning or intimation to any of the passengers (including those who were beyond the platform) not to get out; and we think that, upon this evidence, on the authority of the cases above referred to, if it needed authority, there was abundant evidence upon which the jury might reasonably have come to the conclusion that the plaintiff had arrived at the spot at which it was intended she should alight, and that she was by the acts of the defendants' servants [274] vants impliedly invited so to do, or *at least that the conduct of the defendants' servants was such as would induce a reasonable person in the plaintiff's circumstances to believe, and did in fact induce her to believe, that she was invited to alight there; which we think would amount to the same thing. The plaintiff, therefore, having been invited to alight at a spot at which the ordinary and usual means of descent were absent, we think that the duty of the defendants not to expose the passenger to undue danger required them to provide some reasonably fit and safe substitute: *Gee v. Metropolitan Ry. Co.* (4); and the question for our consideration is whether a jury might not reasonably have come to the conclusion that the company failed in the per-

(1) Law Rep., 7 C. P., 321, 324.

(2) Law Rep., 9 Q. B., 66.

(3) Law Rep., 9 C. P., 126, 132, 134.

(4) Law Rep., 8 Q. B., 161.

formance of that duty as regards the plaintiff. Now the only means provided were the iron step and the footboard, and although a man using ordinary care might perhaps have safely adopted those means of descent, the jury might have thought that the same measure of reasonable means hardly applies to the case of a woman. Her mode of life, dress, and habits render her ill adapted to grapple with difficulties of the character involved in this question; and if the jury had found that the means adopted were in this respect not such as ordinary and reasonable care required in reference to the plaintiff, we think it could hardly be contended that the court would be bound to send the case back for a new trial: *Foy v. London, Brighton and South Coast Ry. Co.* (*)

It was, however, argued that the injury here was the result not of any want of care on the part of the defendants, but was caused by the voluntary act of the plaintiff herself in endeavoring to alight of her own will and with her eyes open. But it has been long established that, if a person by a negligent breach of duty expose the person towards whom the duty is contracted to obvious peril, the act of the latter in endeavoring to escape from the peril, although it may be the immediate cause of the injury, is not the less to be regarded as the wrongful act of the wrongdoer: *Jones v. Boyce* (*); and this doctrine has, we think, been rightly extended in more recent times to a "grave inconvenience," when the danger to which the passenger is exposed is not in itself *obvious. In *Adams v. Lancashire and York-shire Ry. Co.* (*), the doctrine was accurately expressed by Brett, J., who says: "If the inconvenience is so great that it is reasonable to get rid of it by an act, not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience." And although the decision in that case has been questioned, the rule laid down by Brett, J., was approved of in *Gee v. Metropolitan Ry. Co.* (*), and is one in which we entirely concur. In the present case, a jury might not improperly have found that the expectation of being carried beyond the Benton station was reasonably entertained by the plaintiff, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to what did not probably present itself to her as any obvious danger, viz., endeavoring to alight by means of the step and footboard. We do not say that the jury

(*) 18 C. B. (N.S.), 225.

(*) 1 Stark., 493.

(*) Law Rep., 4 C. P., at p. 744.

(*) Law Rep., 8 Q. B., at p. 178.

might not, on this evidence, have found that the plaintiff herself, by negligence on her part, so far contributed to the result as that, but for her negligence, it would not have come about; but we certainly, in the present case, cannot say that there was any such conclusive evidence that the injury was brought about or materially conduced to by any act of negligence of the plaintiff, as to have rendered it the duty of the judge to have withdrawn the case from them.

The rule, therefore, will be made absolute to enter the verdict for the plaintiff for £100.

Rule absolute.

Attorneys for plaintiff: *Brownlows.*

Attorneys for defendants: *Williamson, Hill & Co., for Richardson, Gutch & Co., York.*

It is not per se negligence for a passenger to alight when a train of cars is slowly moving: *Jeffersonville, etc., v. Hendricks*, 41 Ind., 48; *Mulhady v. Brooklyn, etc.*, 80 N. Y., 870; *Morrison v. Erie, etc.*, 56 N. Y., 302; *McIntyre v. N. Y. C. R. R.*, 37 N. Y., 287; *Fyler v. N. Y. Cent. R. R.*, 49 N. Y., 47; *Doss v. R. R. Co.*, 59 Missouri, 27; *Johnson v. Westchester, etc.*, 70 Penn. St. R., 357; *Nichols v. Sixth Av. R. R.*, 38 N. Y., 131; *Lambeth v. North Carolina, etc.*, 70 N. C., 494; *Curtis v. Detroit, etc.*, 27 Wisc., 158; *R. R. Co. v. Badeley*, 54 Illinois, 20; *Penn., etc., v. Kilgore*, 82 Penn. St. R., 292.

Otherwise if not moving slowly: *Mittlestadt v. Ninth Av., etc.*, 4 Robertson, 377, 82 How., 428; *Morrison v. Erie Railway Co.*, 56 N. Y., 302; *Lucas v. New Bedford, etc.*, 6 Gray, 64; *Nichols v. Sixth Av. R. R. Co.*, 38 New York, 131; *Guinon v. N. Y., etc.*, 3 Rob., 25; *Thrings v. Central Park, etc.*, 7 Robertson, 616; *R. R. Co. v. Slotton*, 54 Illinois, 133.

So it is negligence to get on to a moving car where a reasonable person ought not to attempt to do so: *Phillips v. Rens., etc.*, 49 N. Y., 177.

The company is liable to one who is negligently injured while getting off one of its cars though he did not intend to become a passenger but went upon the car as an escort to a lady friend with a child. He is entitled to a reasonable time to escort her to a seat and to get off: *Doss v. R. R. Co.*, 59 Missouri, 27.

So if properly upon the company's grounds for any purpose: *Tobin v. R. R. Co.*, 59 Maine, 183, 8 Am. Rep., 415, and note 417.

But see *Lucas v. New Bedford, etc.*, 6 Gray, 64.

A female passenger has a right to expect the servants of the company will afford her proper assistance in alighting: *Jeffersonville v. Hendricks*, 41 Ind., 48.

[Law Reports, 10 Queen's Bench, 276.]

May 4, 1875.

276]

*BULLOCK and Others v. CAIRD.

Action against one of several Joint Contractors—Foreign Law—Lex loci fori—Procedure.

To an action against a single defendant, for a breach of an agreement to build a vessel entered into between the plaintiffs and C. & Co., the defendant pleaded that there was a trading partnership or firm domiciled and carrying on business in Scot-

land by the name of C. & Co., and that the agreement was an agreement made in Scotland by the plaintiffs with the firm, and was to be performed wholly in Scotland without the jurisdiction of the English courts and within the jurisdiction of the Scotch courts; and by the law of Scotland the firm was and is a distinct person from any or the whole of the individual members of whom it consists and of whom the defendant is one; and the firm, by the law of Scotland, is capable of maintaining the relation of debtor and creditor separate and distinct from the obligations of the partners as individuals, and can hold property, and has the capacity of suing and being sued as such separate person by the name of C. & Co.; that the agreement was made by the firm as such separate person and not jointly and severally by the individual members thereof; that at the date of the agreement the firm consisted of certain individual members, who are all domiciled in Scotland; and that by the law of Scotland the defendant was, as a partner in C. & Co. in the making of the agreement, liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual partners jointly for any breaches of the agreement, and it is a condition precedent to any individual liability attaching to the defendant as an individual member of the firm in respect of the agreement that the firm, as such person, or the whole individual partners jointly, should first have been sued and that judgment should have been recovered against the firm or the whole of the partners jointly, and that the plaintiffs have not sued the firm of C. & Co. nor the whole of the partners jointly, nor recovered judgment against it or them:

Held, on demurrer, that the matters stated in the plea were matters of procedure, and that the plea was therefore bad.

ACTION by the plaintiffs against the defendant for the breach of an agreement to build a ship.

The material part of the agreement, which was set out in the declaration, was as follows:

"Glasgow, July 15th, 1874. Messrs. Caird & Co., ship-builders, Greenock, agree to build for Messrs. James and George Bullock & Co., London, who agree to accept an iron sailing ship of the following dimensions," &c. Throughout the agreement the parties were mentioned as Caird & Co. and Bullock & Co.

Plea, that there was a trading partnership or firm domiciled and carrying on business in Scotland by the name of Caird & Co., *and the alleged agreement was an agree- [277] ment made in Scotland by the plaintiffs with the firm, and was to be performed wholly in Scotland without the jurisdiction of the English courts and within the jurisdiction of the Scotch courts, and by the law of Scotland the firm was and is a separate and distinct person from any or the whole of the individual members of whom it consists and of whom the defendant was and is one, and the firm, by the law of Scotland, is capable of maintaining the relation of debtor and creditor separate and distinct from the obligation of the partners as individuals, and can hold property, and has the capacity of suing and being sued as such separate person by its name of Caird & Co., and the alleged agreement was made by the firm as such separate person and not jointly and severally by the individual members thereof; that at the date of the agreements the firm consisted of certain indi-

1875

Bullock v. Caird.

viduals, namely, the defendant James Tennant Caird and Patrick Tennant Caird, and has always since consisted and still consists of the same members, and the firm and each of its individual members then was and always since has been and still is domiciled and carrying on business in Scotland, and within and subject to the jurisdiction of the Scotch courts and possessed of sufficient property and funds, within and subject to the jurisdiction to answer in full the claim of the plaintiffs; that by the law of Scotland the defendant became and was, as a partner of the firm of Caird & Co., on the making of the agreement, liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual partners thereof jointly for any breaches of the agreement; and save as aforesaid no liability by the law of Scotland attached or attaches to the defendant in respect of the agreement; that by the law of Scotland it is a condition precedent to any individual liability attaching to the defendant or any individual members of the firm in respect of the agreements that the firm as such person as aforesaid or the whole individual partners thereof jointly should first have been sued, and that judgment should have been recovered against the firm or the whole of the said partners jointly, and that the plaintiffs have not sued the firm of Caird & Co. nor the whole of the partners jointly, nor recovered judgment against it or them.

Demurrer to the plea and joinder.

278] **Cohen*, Q.C. (*J. C. Mathew* with him), in support of the demurrer: The plea is bad. It does not allege that Caird & Co. are a corporation, or that the plaintiff could sue Caird & Co. in this country by its name of Caird & Co., it merely alleges that by the law of Scotland it is a condition precedent that the firm, or all the members of the firm, should be sued before any liability can attach to an individual member of the firm. The plea, therefore, merely states the form of procedure in Scotland: but the forms of remedies and modes of proceeding are regulated solely by the *lex fori*; in this case by the law of England. It is no objection to a suit instituted in proper form here that it would have been instituted in a different form in the court of the country where one of the joint contractors resides, or where the contract was made: *General Steam Navigation Co. v. Guillo* ('); *Mostyn v. Fabrigas*. (') [He was then stopped.]

W. Williams, Q.C. (*English Harrison* with him), *contra*:

(') 11 M. & W., 877.

(') 1 Sm. L. C., at p. 623, 6th ed.

The plea is good. It alleges that the defendant is domiciled in Scotland; that the contract was made in Scotland, and is governed by Scotch law; and that by the law of Scotland the defendant's liability can only arise after judgment has been obtained against the firm or all the members of the firm. It is like suing a corporation, and, after judgment is obtained, making the individual members parties to the action by a writ of *scire facias*, and then issuing execution against them. The plea is a good plea in bar.

Cohen, Q.C., was not heard in reply.

BLACKBURN, J.: It is quite clear that the firm of Caird & Co. are not a body corporate. The plea alleges that the firm, or the whole individual partners thereof jointly, should first have been sued. If one of the members of the firm was not joined it might be a bar to an action in Scotland, but it could only be pleaded in abatement in an action in England. I think all the matters stated in the plea are mere matter of procedure, and that the plea is bad.

MELLOR and FIELD, JJ., concurred.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Hollams, Son & Coward.*

Attorneys for defendant: *Freshfields & Williams.*

CASES
DETERMINED BY THE
COURT OF COMMON PLEAS,
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,
IN AND AFTER
HILARY TERM, XXXVIII VICTORIA.

[Law Reports, 10 Common Pleas, 189.]

Jan. 22, 1875.

189] *BRADSHAW and WIFE v. THE LANCASHIRE AND
YORKSHIRE RAILWAY COMPANY.

*Executors and Administrators—Contract—Action by Executor—Breach of Contract
causing Testator's Death—Damage to personal Estate.*

Where a passenger on a railway was injured by an accident, and after an interval died in consequence:

Held, that his executrix might recover in an action for breach of contract against the railway company the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business.

DECLARATION in substance stated that the testator, of whom the female plaintiff was executrix, in his lifetime carried on business as a boot and shoe manufacturer, and that, in consideration that the testator would become a passenger to be carried by the defendants upon their railway on a certain journey for reward to the defendants in that behalf, the defendants promised the said testator to take due care in carrying him whilst he was such passenger. Averments, that he became such passenger and of performance of conditions precedent. Breach, that the defendants did not take due care in carrying the testator whilst such passenger on such journey, whereby he was injured, and incurred expense in medical attendance and otherwise in relation to his injuries, and was prevented from attending to his business, and from personally conducting the same and from realizing profits

therein, and great loss and damage was occasioned to the personal estate of the testator.

Pleas: 1, denial of the promise; 2 and 3, denying the averment that the testator carried on business as alleged and the allegation of damage to the personal estate of the testator; 4, denial of breaches; 5, demurrer.

Issue and joinder in demurrer.

At the trial, before Denman, J., at the last Manchester Spring Assizes, the facts were as follows: The female plaintiff was the executrix of the testator, and he, while travelling on the defendants' railway, had been injured by a railway accident. He ultimately died from the injuries received, and it was not disputed *that he had incurred expenses [190 for medical attendance amounting to £40, and that the loss occasioned to his estate in respect of his being unable to attend to business previous to his death was £160.

It was contended, however, on the part of the defendants, that the maxim *actio personalis moritur cum persona* applied, and that the action was not maintainable; and, secondly, that the damages for loss of business were too remote. The verdict was entered for the plaintiffs for £200, leave being reserved to the defendants to enter a verdict for themselves or to reduce the damages on the above grounds. It was agreed that the demurrer should abide the event of the argument on the rule.

A rule *nisi* had been obtained accordingly, against which Sir J. Holker, S.G., and R. G. Williams, Q.C., showed cause: This is an action of contract, and a right of action survives to the personal representative in respect of loss arising from the breach of contract in the testator's lifetime. The ground of the action is not the death of the testator. He could clearly have sued for the cause of action declared on in his lifetime, and the contention on the defendants' side must be that his happening to die subsequently destroys that cause of action. There is no principle upon which it should have that effect. The death of the testator destroys that portion of the action which is personal in its nature, viz., the right to recover for the personal injuries; but it leaves intact the cause of action for damage to the personal estate. The decision in *Potter v. Metropolitan District Ry. Co.* (1), which was affirmed by the Exchequer Chamber, is an authority for the plaintiffs, as far as it goes, as showing that the action is in contract: *Alton v. Midland Ry. Co.* (2). The damages for loss of business are clearly not too remote. Such damage always forms an element in the assessment

(1) 30 L. T. (N.S.), 765.

(2) 19 C. B. (N.S.), 213; 34 L. J. (C.P.), 292.

1875

Bradshaw v. Lancashire and Yorkshire Railway Co.

of the damages in such cases. [They cited *Knights v. Quarles* (*); *Chamberlain v. Williamson* (*).]

Herschell, Q.C., and *J. Edwards*, Q.C., supported the rule: It is contended that in cases of actions by the personal representatives of persons injured through the negligence of others, and whose injuries have resulted in death, the only [191] right of action is that *given by Lord Campbell's Act, 9 & 10 Vict. c. 93, s. 1. At common law the action for personal injuries dies with the person. The damages in respect of expenses, &c., are in such a case merely subsidiary to the personal injuries, the right of action for which is gone, and must go with such right of action. Otherwise it must be maintained that there are originally two causes of action, one in respect of personal injuries, the other in respect of loss to the personal estate. There is no instance of this cause of action having been maintained heretofore, and yet in most of the cases when a railway accident has caused death there must have been some loss to the personal estate in the injured person's lifetime: *Potter v. Metropolitan District Ry. Co.* (*) is distinguishable. The principle of that case has no application whatever to the present. There the wife having sustained personal injuries, the husband's estate was injured, and the husband having died, it was held that the wife, as his personal representative, could recover in respect of the loss to his personal estate. No such point as that taken here could have arisen in that case, for the person whose estate was injured did not die in consequence of the railway accident there. Secondly, the loss to the estate is not recoverable in an action of contract. The principle of *Hadley v. Baxendale* (*) applies. The damages are not the natural and direct consequence of the breach of contract, and the defendants had no notice that such damage would be occasioned.

GROVE, J.: I am of opinion that this rule should be discharged. The action is brought by the executrix of a person whose death was caused by a railway accident, in respect of damages occasioned to the testator's estate. It is to be taken that the estate was damaged, not consequentially upon the testator's death, but by his inability to attend to his business in his lifetime, the direct and natural result of the injury he suffered. It is no doubt singular that up to the case of *Potter v. Metropolitan District Ry. Co.* (*), no action of this kind appears to have ever been brought, a circumstance which has been sometimes relied on as an argu-

(*) 2 B. & B., 102.

(*) 2 M. & S., 408.

(*) 30 L. T. (N.S.), 765.

(*) 9 Ex., 341; 23 L. J. (Ex.), 179.

ment against sanctioning a new form of action. It may, however, be that this is accounted for by the comparative infrequency of accidents of *this sort in former times, and [192 the fact that until Lord Campbell's Act the right to damages for the personal injury, as compared with which the damages to the estate would generally be a small matter, was lost by the death of the party injured. The same argument might have been applied to the action in *Potter v. Metropolitan District Ry. Co.* (¹), up to the decision of which case no action of the kind had ever been heard of, so far as I know, if we except the case put by way of illustration by Richardson, J., in *Knights v. Quarles* (²).

The Court of Exchequer Chamber, nevertheless, held in that case that the action would lie, and by their decision we are bound, unless the present case is so far distinguishable as to render the same principle inapplicable. I am of opinion that it is not, and there is a sufficient ground of action here. The ground of action in both cases is that there has been a breach of a contract made with the testator during his lifetime, whereby in his lifetime his estate was injured by his having to pay medical and other expenses, and injury to his business, the direct and immediate consequence of the accident.

Does the fact that, in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's Act, take away any right of action that the executrix would have had but for that act? It does not seem to me that the act has that effect, either expressly or by necessary implication. The intention of the act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the act he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the act. Another *argument for the defendants was, that inas- [193 much as the remedy for the personal injury died with the

(¹) 30 L. T. (N.S.), 765.

12 ENG. REP.

(²) 2 B. & B., 102.

1875

Bradshaw v. Lancashire and Yorkshire Railway Co.

person, the damages to the estate, being consequential on the personal injury, died also. I do not at all see that that follows as a necessary or logical consequence. The two sorts of damage are separable: the one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured, and as such dies with the person. I do not see that there is any valid distinction between this case and that of *Potter v. Metropolitan District Ry. Co.* (¹), or why the damage to the estate, that would clearly be recoverable if the injured party lived, should be the less recoverable because of his death. For these reasons, I am of opinion that the action is maintainable. With regard to the distinction between the two classes of damages, it was contended that the damages in respect of the testator's inability to attend to business were too remote within the rule in *Hadley v. Baxendale* (²). The decision there was, that the defendants in an action of contract are only to be liable to the natural consequences flowing directly from their breach of contract, or which may be taken to have been contemplated by the parties. It would be impossible to carry on the affairs of life if a contracting party were liable in respect of extraordinary and unknown sources of damage, a liability for which the consideration given might be wholly inadequate. This doctrine might be applied more plausibly if it were sought to recover consequential damages to the estate arising from the death, but what is here sought to be recovered is the immediate injury to the estate caused in the testator's lifetime by his incapacity to attend to business, the direct result of the accident. Such damages may well be considered as being within the contemplation of the defendants when they entered into the contract. I therefore think that both sorts of damages are recoverable, and that this rule must be discharged.

DENMAN, J.: I am of the same opinion. Whatever may be the usual form of action in such cases, it is quite clear that the declaration in this case was framed in contract. The damage alleged was damage to the estate of the testator, [194] and at the trial two *heads of damage were shown: viz., £160 damage in respect of the business, which it was agreed had suffered to that amount, and £40 medical and other expenses. I am of opinion that the plaintiffs are entitled to retain the verdict for the full amount of £200.

The first question was, whether the action can be maintained at all. The action is for a breach of contract occurring in the lifetime of the testator, but which ultimately caused

(¹) 30 L. T. (N.S.), 765.

(²) 9 Ex., 341; 23 L. J. (Ex.), 179.

his death. And it was urged that the case fell within Lord Campbell's Act, that the only action that could be brought was under that act, and that these damages could not be recovered as damages to the estate. This appears, no doubt, to be the first case of similar damages being sued for in an action like the present, but there is considerable authority for holding as we do.

In Williams on Executors, vol. 1, p. 798, a work in itself of great authority, all the cases on the subject are commented upon and the law is stated entirely in accordance with the dictum of Richardson, J., in *Knights v. Quarles* ⁽¹⁾. It is distinctly laid down that an executor may recover damages to the personal estate arising out of a contract, though an action of tort might have been brought for the personal injury, resulting from the same act of the defendant, before the death of the testator. The case of *Alton v. Midland Ry. Co.* ⁽²⁾ is also referred to in a note; and it is clear the learned author, who was a judge of this court, when that case was decided, looked upon the dictum of Willes, J., in that case as a confirmation of the opinion of Richardson, J., in *Knights v. Quarles* ⁽¹⁾. He proceeds, however, to say that the rule there laid down must be taken to be limited by a qualification introduced by the modern decision of *Chamberlain v. Wilkinson* ⁽³⁾, viz., that an action by the executor for breach of contract will not lie where the damage is purely personal, and there is no damage to the estate. In that case the action was for breach of promise of marriage, and the decision turns distinctly on the ground that there was no special damage stated on the record, and so the executor could not have an action because the only damages recoverable were purely personal. Here, the damages are not personal in their nature, but are *damages to the estate, and the case falls therefore within the rule as laid down by Sir Edward Vaughan Williams, and not the exception. Again, the case of *Potter v. Metropolitan District Ry. Co.* ⁽⁴⁾, though not exactly in point, is to some extent an authority in favor of the view we take. In one respect it was a stronger case, for it was doubtful there whether the declaration was in contract, whereas it is clearly so here. There the wife was the person to whom the injury was done, and she sued as executrix to her husband who had died, in respect of the damage to the personal estate. The case was not, therefore, one of personal injury ultimately causing death, and consequently is not on all-fours with the present. The principle,

⁽¹⁾ 2 B. & B., 102.

⁽²⁾ 2 M. & S., 408.

⁽³⁾ 19 C. B. (N.S.), 218; 34 L. J. (C.P.), 292.

⁽⁴⁾ 30 L. T. (N.S.), 765.

1875

Dugdale v. Lovering.

however, of the decision is quite consistent with our judgment in this case. The rule to enter a nonsuit must for these reasons be discharged.

Then, it being admitted that if the action lies the £40 can be recovered, the only question that remains is, whether the £160 for loss of business can be recovered. It was said that the rule in *Hadley v. Baxendale* ⁽¹⁾ prevents this amount being recovered. I do not think so. Every plaintiff is entitled to recover the damages that are the natural consequence of a breach of a contract. I apprehend that where the contract is to carry a particular man, A. B., safely, and by reason of the breach of such contract A. B. is personally injured, any damage actually caused to the estate of A. B. by his consequent incapacity to attend to business is a natural consequence of the breach of contract, and not too remote, or one which the defendants could say that they did not contemplate. The case is essentially different from that of a contract for the supply of a chattel. It was not suggested at the trial that the damage in question had not actually occurred, or could in any way have been mitigated by hiring a substitute, or otherwise. It appears to me, therefore, that the rule must be discharged on this point also.

Rule discharged.

* Attorneys for plaintiffs: *Johnson & Weatheralls, for Shippey.*

Attorneys for defendants: *Clarke, Woodcock & Ryland, for Grundy & Co.*

(1) 9 Ex., 341; 23 L. J. (Ex.), 179.

[Law Reports, 10 Common Pleas, 196.]

Jan. 28, 1875.

196] *DUGDALE and Others v. LOVERING. *

Indemnity—Implied Contract of—Act done by one Person at another's Request injurious to a third Party.

The plaintiffs were in possession of certain trucks, which were claimed by the defendant, and also by the proprietors of the K. P. Colliery. A correspondence took place between the plaintiffs and the defendant, in which the plaintiffs asked for an indemnity if they should deliver up the trucks to the defendant. The defendant, without giving any answer as to the indemnity, wrote requiring the plaintiffs to send the trucks back to him, which they thereupon did. The K. P. Colliery proprietors then brought an action against the plaintiffs for conversion of the trucks, and their claim proving well founded, the plaintiffs were obliged to pay a sum of money, in settlement of the action, which they sought to recover from the defendant upon a contract of indemnity:

Held, following the doctrine laid down in *Betts v. Gibbins* (2 Ad. & E. 57) and *Top-*

lis v. Grane (5 Bing. N. C., 836), that there was, under the circumstances of the case, evidence of an implied promise to indemnify.

The principle upon which in such cases a contract of indemnity is implied is not confined to cases of principal and agent, or employer and employed.

DECLARATION in substance stated that the plaintiffs were in possession of certain trucks, and while they were in possession of the same they were claimed by certain persons carrying on business under the style of the Kiveton Park Colliery Company, and, thereupon, in consideration that the plaintiffs would refuse to deliver the trucks to the Kiveton Park Colliery Company and would deliver them to the defendant, the defendant promised to indemnify the plaintiffs for so doing; that the plaintiffs did so refuse to deliver the trucks to the Kiveton Park Colliery Company, and did deliver them to the defendant, and that the persons so carrying on business as the Kiveton Park Colliery Company afterwards brought an action against the plaintiffs for refusing to deliver the trucks to them, and the plaintiffs were obliged to pay a large sum of money to prevent further proceedings in the action and for costs, and that all conditions, &c., were performed, &c., yet the defendant did not indemnify the plaintiffs in respect of the said sum of money.

2d count, for money paid.

Pleas (*inter alia*), denial of the promise and never indebted. Issue thereon.

*At the trial the facts were as follows: The trucks [197 in question were sent to a colliery of which the plaintiffs were owners. While there they were claimed by one Phillips, and also by persons carrying on business as the Kiveton Park Colliery Company, who claimed to have purchased them from Phillips. Phillips' affairs subsequently became the subject of proceedings for liquidation by way of arrangement, and the defendant, who was appointed receiver under the liquidation, claimed the trucks.

A lengthy correspondence took place between the plaintiffs and defendant, the latter demanding the trucks, and the former, on several occasions, asking for an indemnity if they gave up the trucks. The defendant, in answer to the plaintiffs' last letter requesting an indemnity, replied, giving no express answer as to the indemnity, but ordering the trucks to be immediately filled with coal and sent to him. The plaintiffs then sent the trucks to the defendant. The Kiveton Park Colliery proprietors thereupon brought an action of trover against the plaintiffs for conversion of the trucks; and their claim proving well founded, the plaintiffs were obliged to pay a sum of money in settlement of the action,

1875

Dugdale v. Lovering.

which they now sought to recover from the defendant. On these facts the verdict was entered for the plaintiffs for the amount they had been obliged to pay, leave being reserved to the defendant to move to enter a nonsuit on the ground that there was no evidence of a promise to indemnify. The court to draw inferences of fact.

A rule *nisi* had been obtained accordingly, against which *Cave* showed cause: It is contended that where the plaintiff has, at the request of the defendant, delivered up to the defendant goods belonging to a third party, the plaintiff is entitled to an indemnity in respect of an action brought by such third party for the value of the goods so delivered up. It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested it should be done. The right to an indemnity does not depend in such a case on any special relation between the parties such as that of principal and agent. Apart from any such principle, there is sufficient ground for inferring a promise to indemnify in the present case from the correspondence between the parties. [He cited *Betts v. Gibbins* ('); *Toplis v. Grane* ('); *Adamson v. Jarvis* ('); *Humphrys v. Pratt* (').]

J. Brown, Q.C., and *J. W. Mellor*, supported the rule: The principle relied upon by the plaintiffs only applies as between parties standing in the relation of principal and agent, and employer and employed. The right to indemnify in such cases grows out of the contract of employment. The authorities cited have no application to the case of perfectly independent parties, between whom there is no special relation arising out of any contract. It is unreasonable in such a case to imply a promise to indemnify from the mere fact that a party claims goods to which he conceives himself entitled. If in such a case the party claiming the goods expressly refuses to indemnify, a promise to indemnify could not be implied. The utmost the authorities establish is, that if the plaintiff gives up the goods under circumstances which justify him in supposing that he is to be indemnified he will be entitled to an indemnity. Here the proper construction of the correspondence is that the defendant expressly refused an indemnity, or, at all events, that the plaintiffs were not entitled to assume that he would give one. The only

(1) 2 Ad. & E., 57.

(2) 5 Bing. N. C., 636.

(3) 4 Bing., 66.

(4) 5 Bl. (N.S.), 154.

authority cited which was not a case of agency is *Humphrys v. Pratt* ⁽¹⁾. But there the defendant represented to the plaintiff, the sheriff, that the goods belonged to the execution debtor, and so took on himself the responsibility in case they turned out not to do so. [They also cited Story on Agency, s. 339.]

BRETT, J.: I am of opinion that this rule should be discharged. The court is not entitled to enter a nonsuit if there was reasonable evidence for the jury of a contract to indemnify. It is clear from the correspondence that the plaintiffs delivered these trucks to the defendant upon the request of the defendant, and it is also clear that they belonged in truth to the Kiveton Park Colliery *Company, who [199 have made the plaintiffs answerable for such delivery. Under these circumstances, does there arise an implied promise by the defendant to indemnify the plaintiffs? In *Adamson v. Jarvis* ⁽²⁾ the declaration was in case, and stated the facts which had arisen, and they were these: The plaintiff was an auctioneer, and the defendant had directed him as such auctioneer to sell certain cattle. The plaintiff did thereupon sell them, and it turned out that they did not belong to the defendant, but to another person. The owner having made the plaintiff responsible, the plaintiff sued the defendant in case for an indemnity. The court there held that there was evidence on these facts from which the jury might say that the plaintiff, having acted on the request of the defendant, was entitled to assume that if what he did turned out to be wrongful as against a third party, he would be indemnified by the defendant. In this case the plaintiff was the defendant's agent. In *Humphrys v. Pratt* ⁽¹⁾ the plaintiff was the sheriff to whom the defendant had given a *fi. fa.* to execute. If he had executed it on cattle as belonging to the execution debtor without more, he could not have claimed indemnity, but the defendant pointed out to him the particular cattle as being the debtor's. The House of Lords held that an indemnity might be implied. In neither of these cases is it stated that the plaintiff at the time he committed the tortious act knew of any claim by a third person, nor was any such fact relied on in the judgments. The implication is not made to rest on the fact of the plaintiff's being an agent, or on notice of the third party's claim, but merely on the fact of the plaintiff having done an act at the request of the defendant which was not manifestly illegal or tortious to his knowledge, but which exposed him to an action. After those cases came that of *Betts v. Gibbins* ⁽³⁾. There the

⁽¹⁾ 5 Bl. (N.S.), 154.

⁽²⁾ 4 Bing., 66.

⁽³⁾ 2 Ad. & E., 57.

1875

Dugdale v. Lovering

plaintiff had delivered to the defendant at his request certain goods which belonged to a third party. There again it was held that a promise to indemnify might be implied, and this decision was not put on the ground of agency. After the judgment in *Betts v. Gibbins* (1), which, following the 200] two former cases, laid *down the principle upon which the implication of an indemnity arises in the broadest terms, there came the case of *Toplis v. Grane* (2), in which Tindal, C.J., one of the most careful expositors of law ever known, laid down the proposition on the subject in these terms: "We think this evidence brings the case before us within the principle laid down in *Betts v. Gibbins* (1), that when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and *bona fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof." It is urged on the part of the defendant that there is no authority for such an indemnity except in the case of agents. But in none of these cases, as I have observed, was the fact of agency relied on. Unless, therefore, the correspondence here is conclusive to show that the plaintiffs did not rely on an indemnity from the defendant, it seems to me that the other facts in the case are evidence on which the jury might find an implied promise to indemnify. It was argued that the correspondence was conclusive to show that the plaintiffs did not rely on an indemnity. It seems to me that so far from this being so, if the case stood on the construction of the correspondence alone, the jury might have implied from it a promise to indemnify the plaintiffs if they would deliver up the wagons. The correspondence shows that the plaintiffs for a long time were hesitating whether to give up the wagons, and gave the defendant notice that if they did they should look to him to hold them harmless. The defendant avoided answering such notice definitely; and eventually, without saying whether he would give an express indemnity or not, made a request to the plaintiffs to send the wagons, which the plaintiffs complied with. From these letters I think the jury might well have found that the plaintiffs were justified in believing, and did believe, that the defendant would indemnify them if they incurred liability. It is not necessary, however, in my opinion, to determine more than that the correspondence did not conclusively show 201] that the plaintiffs were not relying on an *indemnity.

(1) 2 Ad. & E., 57.

(2) 5 Bing. N. C., 636.

For these reasons I think the argument for the defendant has failed, and that the judge could not have nonsuited the plaintiffs.

GROVE, J.: I am of the same opinion. The plaintiff's counsel cited four cases in support of the proposition that either the law inferred, or the jury might find upon the facts proved, an implied promise on the part of the defendant to indemnify the plaintiffs. Now these cases seem to me to make out the proposition, at all events, that the jury might infer such a promise. The passages cited from *Betts v. Gibbins* (*), and *Toplis v. Grane* (*), are very explicit to the effect that when acts are done by one person at the request of another, which are not apparently illegal, a promise to indemnify may be inferred. The counsel for the defendant did not dispute the correctness of these decisions, but urged that in three out of the four the case was one of principal and agent, or employer and employed, and that the expressions used in the judgment, having *prima facie* a wider application, must be limited to such cases.

In some cases, no doubt, a general proposition stated in a judgment must be limited by reference to the subject-matter, but that is where the proposition would be obviously unreasonable unless so limited. I do not find that in these cases there is anything to show that the expressions must be limited to the case of agency. I should hesitate to say that in cases of this sort it can be an absolute proposition of law that the party making the request is bound to indemnify. Whether there is such an obligation must greatly depend on the circumstances of each individual case, the effect of which seems to be for the jury to determine. All I wish to be considered as deciding is that in the present case there was reasonable evidence for the jury of an implied contract of indemnity. The case turns in great measure on the correspondence, the substance of which is as follows: The defendant claims the trucks, which are also claimed by the Kiveton Park Colliery Company. It has been urged that the plaintiffs had greater means of knowledge as to the ownership of the trucks than the defendant. *I cannot [202 see any reason why this should be assumed to be so; *prima facie* the trustee who represented the person formerly their owner should have known more about them than the plaintiffs, to whose colliery they were sent to be filled. These conflicting claims being made to the trucks, the plaintiffs state that they do not like giving them up without an indemnity. They state this in several letters, but the defen-

(*) 2 Ad. & E., 57.

(*) 5 Bing. N. C., 636.

dant does not reply explicitly, but ultimately he sends a letter, which may be more appropriately termed an order than a request, to send the wagons back. Is it not a question for the jury whether, when the defendant thus somewhat peremptorily ordered the wagons to be returned, he did not impliedly assent to the plaintiffs' request for an indemnity? He certainly did not express dissent in any way, and it does not appear altogether unreasonable to say that the plaintiffs were entitled to infer from the correspondence, coupled with the facts, that he assented. With regard to the effect of the previous claim by the Kiveton Park Colliery Company, it seems to me to cut both ways. It may be urged, on the one hand, that the plaintiffs having notice, acted with their eyes open, and were not entitled to rely on the defendant's assertion of right to the property; on the other hand, the defendant having ordered the goods to be sent to him, with notice that they were claimed by another, acted with knowledge of the risk that the plaintiffs incurred. And this may perhaps be said to make it more reasonable to infer a promise to indemnify against him. On the whole, I am clearly of opinion that there was ample evidence to support the finding of the jury, and that we cannot therefore enter a nonsuit.

Rule discharged.

Attorneys for plaintiffs: *Power, Andrew & Wood.*

Attorneys for defendant: *Linklaters & Co.*

The principal case must certainly commend itself to the sense of justice of courts and the bar. It is well sustained by authority: *Betts v. Gibbins*, 2 Ad. & Ellis, 57, 29 Eng. Com. Law; *Saulspaw v. Louisville, etc.*, 1 Tenn. Chy. (Cooper), 8.

An agent may maintain an action against his principal for indemnity upon an implied promise to indemnify him against loss for innocently and in good faith executing his orders: *Allare Outland*, 2 John. 's Cases, 52; *Turner v. Jones*, 1 Lansing, 147; *Howe v. Buffalo, etc.*, 38 Barb., 124, 37 N. Y., 297; *Cas- tie v. Noyes*, 14 N. Y., 332; *Saulspaw v. Louisville, etc.*, 1 Tenn. Chy. (Cooper), 8; *Wallace v. Gulchrist*, 24 Upper Canada C. P., 40.

A city cannot indemnify a public officer against the consequences of enforcing a by-law for the benefit of individuals: It may for the discharge in good faith of his official duty: *Gregory v. City of Bridgeport*, 41 Conn., 76.

But if an agent or employe do an act not within his principal's directions, no promise to indemnify him will be implied: *Harvey v. Rochester*, 35 Barb., 177.

For the principal or employe is not liable: *Hilliard v. Richardson*, 3 Gray, 349.

In *Bailey v. Bossing*, 28 Conn., 455, the court said "The rule that there can be no contribution among wrongdoers, has so many exceptions that it can hardly with propriety be called a general rule. It applies properly only to cases where there has been an intentional violation of law, or where the wrongdoer is presumed to have known that the act was unlawful. It was accordingly held that one of three partners who had paid a judgment against the three for an injury negligently inflicted upon a passenger in a stage coach, was entitled to contribution from his copartners.

See also *Wallace v. Gilchrist*, 24 Upper Canada C. P., 40.

Where the object is apparently in furtherance of justice and in the exercise of a right, and the means are not in themselves criminal, and not known to the person employed to be wrongful to a third person, a contract to save harmless, one who from good motives did an act for his employer, which, contrary to his expectation, happened to be an injury to a third person, will be enforced: *Ives v. Jones*, 3 Iredell (Law), 538; *Wallace v. Gilchrist*, 24 Upper Canada, 40.

Where one was employed, under a promise of indemnity, to do an act which turned out to be a trespass on another's property, and the employer and person employed were both sued, but the jury found the former not guilty, and assessed damages against the latter; Held that the verdict did not conclude the person employed, in a suit by him on the promise of indemnity, from showing the true state of the facts and the liability of the defendant: *Ives v. Jones*, 3 Iredell (Law), 538.

The reason of the latter case is that co-defendants have no right to delay a plaintiff even as to their equities as between themselves, and that consequently a judgment does not conclude defendants as to their rights *inter se*: *King v. Whittaker*, 44 N. Y., 565; *Garnsey v. Knights*, 1 N. Y. Supreme Ct. R., 259, affirmed by Court of Appeals, April 20, 1875; *Smart v. Bement*, 3 Keyes, 241; *Farmer's Loan, etc.*, v. *Seymour*, 9 Paige, 539; *Decker v. Judson*, 16 N. Y., 439, 449; *Hoyt v. Martense*, 16 N. Y., 234, 235; *Woodgate v. Fleet*, 9 Abb. Prac., 238, 240; *Freeman on Judgments* (2d ed.), § 227; *Miller v. Case*, *Clarke's Chy.*, 895; *Stephens v. Hall*, 2 Robertson, 676; 2 Barb. Chy. Prac., 180; *Woodworth v. Bellows*, 4 How. Prac., 24.

But see *Equity Draftsman*, 823 note.

Though in order to work out his equity against a co-defendant, a defendant may interpose a claim to have the plaintiff transfer to him the cause of action: *Bank v. Hunter*, 4 Bosw., 646; 2 Barb. Chy. Prac., 180.

This may be done instead of filing a cross bill: *Moak's Van Sant. Pl.*, 635; *Story's Eq. Pl.*, § 392; *Bogardus v. Parker*, 7 How. Prac., 305.

The law will not raise an implied promise to indemnify a party—even an agent—for committing a known trespass or illegal act: *St. John v. St. John's Church*, 15 Barb., 346; *Castle v. Noyes*, 14 N. Y., 332.

Nor is an express indemnity against a known trespass or illegal act valid: *St. John v. St. John's Church*, 15 Barb., 348; *Castle v. Noyes*, 14 N. Y., 332; *Stone v. Hooker*, 9 Cowen, 154; *Shackell v. Rosier*, 2 Bingham's N. C., 634, 29 Eng. Com. Law Rep.; *Ives v. Jones*, 3 Iredell (Law), 538; 1 Pars. on Cont. (6th ed.), 37; 1 Waterman on Trespass, §§ 29-31; 1 Hilliard on Torts (4th ed.), 188, note.

So an indemnity against damages for a libel is invalid, though given after the publication of the libel, in consideration that the publisher will not disclose the name of the writer on its being demanded by the victim of the article: *Atkins v. Johnson*, 43 Vermont, 78.

The law will raise an implied promise of indemnity for an act done in good faith or without knowledge of its wrongful character at the instance of the defendant: *Hoice v. Buffalo, etc.*, 38 Barb., 124, 37 N. Y., 297; *Turner v. Jones*, 1 Lansing, 149; *St. John v. St. John's Church*, 15 Barb., 346; *Castle v. Noyes*, 14 N. Y., 332; *Toplis v. Grane*, 5 Bingham's N. C., 636, 35 Eng. Com. Law; *Adamson v. Jarvis*, 4 Bing., 66; *Wallace v. Gilchrist*, 24 Upper Canada C. P., 40; *Coventry v. Barton*, 17 Johns., 142; 1 Waterman on Trespass, §§ 29-31; *Saulspaw v. Louisville, etc.*, 1 Tennessee Chy. (Cooper), 8.

So where the illegality is doubtful: *Betts v. Gibbins*, 2 Adolphus & Ellis, 57; 1 Parson on Cont., (6th ed.), 37.

And an express promise to indemnify such a person against such an act is valid: *Stone v. Hooker*, 9 Cowen, 154.

If one of two joint wrongdoers pay an entire judgment against them, he can have no action against his co-defendant for contribution: *St. John v. St. John's Church*, 15 Barb., 348; 1 Pars. on Cont. (6th ed.), 37, note; 1 Waterman on Trespass, §§ 29-31.

But see *Bell v. Walsh*, 7 California, 84.

Though a city against which a recovery has been had for injuries sustained by falling into an excavation, is not a joint wrongdoer as against the

1875

Cheestham v. Mayor, &c., of Manchester.

person causing the excavation : *City of Chicago v. Robbins*, 2 Black., 418, 2 Am. Law Reg., N. S., 529, overruling *Scammon v. City of Chicago*, 25 Illinois, 424, in part.

Nor is a city as against a railway company which was bound to keep snow and ice from accumulating on its track, but did not do so, in consequence of which a traveller was injured and recovered of the city : *City of Troy v. Troy, etc.*, 3 Lansing, 270, 49 N. Y., 657.

In Tennessee it has been held that equal contribution among tortfeasors is not inequitable, and, although the

law may not support an action to enforce contribution where the payments have been unequal ; neither will equity lend its aid to prevent the execution of a legal arrangement which secures equality of contribution.

Where one wrongdoer had procured an assignment to a third person of the judgment against both, held that equity would not deprive the defendant who had procured such transfer of any advantage resulting from such assignment : *Saulsboro v. Louisville, etc.*, 1 Tenn. Chy. (Cooper), 8.

[Law Reports, 10 Common Pleas, 249.]

Jan. 19, 1875.

249] *CHEETHAM V. THE MAYOR, &c., OF THE CITY OF MANCHESTER.

Construction of Manchester Improvement Act, 30 Vict. c. xxxvi., s. 38—Dangerous Buildings—Conclusiveness of Certificate of City Surveyor—Ratification by Corporation of Acts of its Officers—Sufficiency of Notice.

The 38th section of the Manchester Improvement Act, 30 Vict. c. xxxvi., enacts that, "if the surveyor of the city, or, in his absence, any other duly qualified surveyor, shall certify in writing that there is imminent danger from any building, the corporation shall and may, without any presentment, notice, or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite;" and by s. 39 the expenses incurred are recoverable from the owner.

The city surveyor having certified that there was imminent danger from a building of which the plaintiff was the owner and occupier, the town-clerk, assuming to act on behalf of the corporation, issued a direction to the surveyor "to cause the building mentioned in his certificate to be taken down or repaired in such manner as he should think requisite." The surveyor thereupon employed a builder to take down and rebuild certain parts of the building, who was paid by the corporation for so doing : and the corporation afterwards recovered the amount from the plaintiff :

Held, that the certificate of the surveyor was conclusive, and could not be questioned in an action to recover back the money so paid.

Held, also, that the acts of the surveyor, authenticated by the town-clerk, were the acts of the corporation ; or that, at all events, they were ratified and adopted by them so as to justify what was done under the certificate.

The certificate and notice referred generally to the "building," No. 95 Market Street : the premises dealt with consisted, besides No. 95 Market Street, of other premises adjoining thereto, being No. 2 Palace Street, for which the plaintiff was separately rated, but connected therewith by internal communications, and occupied therewith by him as one set of business premises :

Held, that the description in the certificate and notice was sufficient to cover both sets of premises.

THIS was an action brought to recover damages for injury alleged by the plaintiff to have been caused to his possessory and reversionary interest in certain houses and shops, with

their fixtures, being Nos. 95, 97, and 99 Market Street, Manchester, and to his stock-in-trade and furniture in No. 95, by acts done by the defendants in alleged execution of powers given to them by two acts of Parliament of 7 & 8 Vict. c. xl., intituled "An act for the good government and police regulation of the borough of Manchester," and called hereafter "The Manchester Police Act, 1844," and by "The Manchester Corporation Waterworks and Improvement Act, 1867," 30 Vict. c. xxxvi.

*The pleadings and particulars were appended to [250 the case. The latter contained, amongst other things, a claim for damage to "books, papers, envelopes, stationery, and other goods, machinery, and utensils damaged or lost," as being goods belonging to the plaintiff's trade and business in the house and shop No. 95, and also for fixtures in a room called "the ruling room," and in a cellar called "the ink cellar," and also for building materials destroyed, in No. 95.

The cause came on for trial before Willes, J., at the Summer Assizes at Manchester in 1872, when a verdict was taken by consent for the damages in the declaration, subject to a case to be stated by an arbitrator, who was to assess the damages before or after the decision of the court. The case stated was substantially as follows:

1. The plaintiff is a wholesale stationer, and, before and at the times of the acts of the defendants hereinafter mentioned in regard to them respectively, was possessed of three houses and shops situate together in a block in Market Street, Manchester, being respectively Nos. 95, 97 and 99, Market Street. He occupied No. 95 for the purposes of his business, and had thereon at the times aforesaid a stock of stationery and other goods. He occupied also certain parts of Nos. 97 and 99. He had previously let the ground floors of Nos. 97 and 99 respectively to tenants as shops; and at the times of the acts of the defendants hereafter mentioned in regard to Nos. 97 and 99, the tenants occupied these shops together with the parts of Nos. 97 and 99 not occupied by the plaintiff.

2. The defendants are the mayor, &c., of Manchester; and they possess certain powers for the government and regulation of that city under the two acts above referred to. The following are the sections of these acts chiefly relied on by the plaintiff and defendants respectively:

Sect. 1 of the Manchester Police Act, 1844, enacts that the mayor, aldermen, and burgesses of the council of the bo-

1875

Cheetham v. Mayor, &c., of Manchester.

rough shall be and they are hereby empowered to carry the act and the several powers thereof into execution.

Sect. 2 enacts that, "for the more conveniently carrying this act and the several powers thereof into execution, it shall be lawful for the council and they are hereby empowered to appoint out of their body from time to time one or more committee or committees, consisting of such number 251] of persons as they *may think fit, to manage and transact all or any of the matters or purposes which they the council are hereby directed or authorized to do, execute, or perform, which committee or committees shall have such or so many of the powers and authorities and discretion by this act given to and reposed in the council as the council shall think fit or proper to delegate to such committee or committees."

Sect. 13. "That every summons, demand, or notice, or other such document under this act, may be in writing or print, or partly in writing and partly in print; and, if the same be required to be given or authenticated by the mayor, aldermen, and burgesses, or by the council, the signature thereof by the town-clerk shall be a sufficient signature or authentication."

Sect. 58. "And whereas it frequently happens that houses and other buildings and walls are, either from litigated titles thereto, or the obstinacy, neglect, or poverty of the owners thereof, or of the parties interested therein, in so ruinous a condition that passengers passing by are in danger of their lives or of some bodily harm from the falling thereof, or of bricks, stones, or timber, or other materials or rubbish therefrom; and it also frequently happens that houses and other buildings erecting or repairing, or the foundations of the same, are not sufficiently fenced or guarded from the street so as to insure safety to the passengers: Be it therefore enacted that it shall be lawful for any two justices to order and direct any house or building or wall therein, which, upon view of the same by the said justices, may appear to be in a ruinous or dangerous state, to be properly fenced and guarded from the street by a proper and sufficient hoard or fence, by and at the expense of the mayor, &c., until the said premises shall be regularly and lawfully proceeded against by presentment of the grand jury at the sessions to be held for the borough, and taken down or repaired; and the owners of such houses, buildings, or walls shall reimburse and pay the expenses incurred by the mayor, &c., in fixing or putting up every such hoard or fence which shall be so ordered and directed by such justices; and the amount of the

said expenses shall and may be recovered in like manner as penalties are recoverable by this act:" see ss. 247, 248.

Sect. 59. "That, if any presentment shall be made by the grand jury at any court of general or quarter sessions, or if any four or more householders living near any house or other building or wall which may be in a ruinous or dangerous condition, shall, by writing under their hands, present to the council that such house or building or wall is in such ruinous or dangerous condition, the council, on notice of such presentment, shall cause a survey of the said house or building or wall to be made with all convenient speed by the surveyor of the council; and, if such surveyor shall find that the said house or building or wall is dangerous or ruinous, he shall immediately cause a proper hoard or fence to be put up, and shall cause notice in writing to be given to the owner or other person interested therein, if such owner or other person interested can be ascertained and found in the borough, and, if not, to be left at or fixed upon the premises, requiring him to take down, secure, or repair such house or building or wall within the space of twenty days then next ensuing; and, if such owner or other person interested shall not begin to repair, take down, or secure the house or building or wall within the said space of twenty days after such notice, and complete such repairs or taking down or securing as speedily as the nature of the case will admit, then the council shall cause such house or building or wall, or so much thereof as shall be in such ruinous or dangerous condition, to be taken down, repaired or secured in such manner as shall from time to time be thought requisite."

*Sect. 280. "The word 'building' shall extend to [252 and comprise all buildings and structures of what nature and kind soever, and every part of such building."

Sect. 4 of the Manchester Corporation Waterworks and Improvement Act, 1847, enacts that "the corporation by the council are hereby empowered to carry this act and the several powers thereof into execution."

Sect. 5. "Any summons, demand, or notice, or other such document under this act, may be in writing or print, or partly in writing or print; and, if the same require authentication by the corporation, the signature of the town-clerk thereto shall be a sufficient authentication."

Sect. 38. "In addition to the powers conferred by s. 59 of the Manchester Police Act, 1844, the corporation may, either before or after a presentment under that section, cause any building which they may consider dangerous to be watched or guarded by the police or otherwise; and, if the surveyor

1875

Cheetham v. Mayor, &c., of Manchester.

of the city, or, in his absence, any duly-qualified surveyor shall certify in writing that there is imminent danger from any building, the corporation shall and may, without any presentment, notice, or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite."

Sect. 39. "All charges incurred by the corporation under the Manchester Police Act, 1844, or under the preceding section, including in such charge a reasonable allowance to the corporation for the services of their officers and servants in the matter, shall and may, in addition to the remedies provided by that act, be recoverable as a penalty under the same act, or by action in any court of competent jurisdiction."

Sect. 49. "With respect to the recovery of penalties the recovery of which is not otherwise provided for, ss. 247 to 261 (both inclusive) of the Manchester Police Act, 1844, are incorporated with this act: Provided that any such penalties shall be recoverable before the stipendiary magistrate or any two justices of the peace in and for the city."

Sect. 51. "Any order or resolution of the corporation or of the council of the city, and any notice, declaration, requisition, demand, or other instrument, made, given, delivered, or served under or in pursuance or in exercise of the powers of this or any other act, or any by-law relating to and in force for the time being within the city, may be either in print or in writing, or partly in print and partly in writing, and shall be sufficiently authenticated by the name of the town-clerk being affixed thereto in print, lithograph, or writing."

3. At the time hereinafter mentioned, J. G. Lynde was the surveyor of the city of Manchester, and Sir Joseph Heron, Knt., was the town-clerk of the said city.

4. On the 13th of July, Lynde certified to the defendants that there was imminent danger from the aforesaid houses, Nos. 97 and 99 Market Street, in a certificate of which the following is a copy:

To corporation of the city of Manchester.

I, J. G. Lynde, of the city of Manchester, civil engineer, surveyor of the said city, hereby certify (in pursuance of the 253] Manchester Corporation Waterworks and *Improvement Act, 1867, and of all other powers enabling me in this behalf) that there is imminent danger from the building described in the schedule hereto.

The schedule above referred to.

All that building in and No. 97 and 99 Market Street, and belonging or reputed to belong to James Cheetham, 95 Market Street. Dated this 13th of July, 1870.

J. G. Lynde, City Surveyor.

5. Thereupon, on the same day, the town-clerk delivered a direction, signed by him (the town-clerk), to the city surveyor, of which the following is a copy :

To the surveyor of the city of Manchester.

The corporation of the city of Manchester hereby direct you to cause the building mentioned in your certificate of this date to be taken down either wholly or in part, or to be repaired or secured in such manner as you shall think requisite. Dated, &c.

Joseph Heron, Town-clerk.

6. On or about the same day, Lynde, the city surveyor, gave notice to the plaintiff that he had certified as above in regard to the said building, and had received the above direction. He stated to the plaintiff that the front wall of the building must be taken down; and proposed that the plaintiff should employ his own men in taking it down. There were at that time tenants of the plaintiff in the shops of Nos. 97 and 99. The plaintiff then asserted that the building was in a safe condition, and refused to accede to the above proposal; and afterwards, on the 19th of July, 1870, wrote to Lynde to the effect that he declined to take the responsibility of pulling down the shops whilst there was a tenant inside; adding the words following: "If you take them down, you take all the risk arising therefrom."

7. After receiving the above direction, Lynde caused the said building to be taken down in part and secured in such manner as he thought requisite. He selected, at the request of the plaintiff, one Maud, a builder to perform this work; and Maud was employed thereon by the defendants, under the directions of Lynde. In accordance with these directions, Maud took down the front wall of the building, to the top of the shops on the ground floor thereof, and a portion of the roof, and put up propping in the inside of the building for its support. Maud was a builder of competent skill; and the propping was in his opinion and in the opinion of Lynde sufficient for the support of the building. The work was begun by Maud on the 14th of July, 1870, and was finished on the 14th of August, 1870; and he then left the building; and *the defendants did not interfere [254 with it thereafter until after its fall as hereinafter mentioned;

1875

Cheetham v. Mayor, &c., of Manchester.

and in the meantime the building was in the possession and under the control of the plaintiff.

8. On the 8th of August, 1870, Maud delivered to the defendants by their direction his bill for the charges of the work; and the bill was paid on the 11th of August, 1870, by the plaintiff by the direction of the defendants.

9. Afterwards, on the 29th of August, 1870, the said building fell. The arbitrator found that the fall of the building was not due to negligence on the part of the defendants or of any person in their employment.

10. After the fall of the said building, Lynde, on the 29th of August, 1870, certified to the defendants that there was imminent danger from the aforesaid house No. 95 Market Street, in a certificate similar in form and contents to the certificate of the 13th of July, 1870, set out in paragraph 4 of the case, except that the building mentioned in the certificate of the 29th of August, 1870, was described therein as follows: "All that building situate in and No. 95 Market Street, and belonging or reputed to belong to Mr. James Cheetham."

11. Thereupon, on the same day, the town-clerk delivered a direction to the city surveyor similar in form and contents to the direction of the 13th of July, 1870, set out in paragraph 5.

12. Afterwards, on the same day, Lynde delivered to the plaintiff a notice, as follows:

City Surveyor's Office, 29 Aug. 1870.

Mr. James Cheetham.

Sir,—I have to inform you that I have this day certified that there is imminent danger from the building described in the schedule hereto, and that the same will be forthwith taken down either wholly or in part, or be repaired or secured in such manner as I may think requisite, at your expense.

J. G. Lynde, City Surveyor.

The schedule above referred to.

Shop, No. 95 Market Street.

13. After receiving the direction last mentioned, Lynde caused such part of the said building as he thought necessary to be taken down. He selected one Cookson, a builder of experience and competent skill, to perform this work; and Cookson was employed thereon by the defendants under 255] his directions. In accordance with such directions, on or before the 31st of August, 1870, Cookson fenced the building from the street by a hoard, and afterwards, on the 1st of September, 1870, began to take down the same, and continued to work till such parts thereof aforesaid were taken down.

14. In February, 1871, the defendants recovered the charges incurred by them in taking down in part the building No. 95 Market Street from the plaintiff before the stipendiary magistrate of the city under ss. 39 and 119 of the Manchester Corporation Waterworks Improvement Act, 1867.

15. Evidence was produced before the arbitrator, on the part of the plaintiff, to show that at the times of the making of the certificates of the 13th of July and 29th of August, 1870, there was not imminent danger from the buildings described therein respectively; and it was contended that findings on the state of the buildings respectively at the aforesaid times ought to be inserted in the case. Some evidence was produced by the defendants to show that at the said times there was such imminent danger from the said buildings as alleged in the certificates: but, as the arbitrator declined to insert in the case such findings except by the direction of the court, on the ground that, if the court should be of opinion that the certificates were sufficient justification to the defendants for the execution in respect of the said buildings of the powers given to them by the acts referred to, such findings would be irrelevant and an improper review by him (the arbitrator) of the allegations of the city surveyor contained in the certificates,—it was agreed between the parties that the further production of evidence as to the state of the buildings at the times aforesaid should be suspended, to be resumed if the court should direct such findings to be inserted.

16. The aforesaid directions to the city surveyor of the 13th of July and the 29th of August, 1870, were not, nor was either of them, made at any meeting of the council of the city or of any committee appointed by the council; nor was there any meeting of the council or of any such committee in regard to the subject-matter thereof; nor was there ever nor is there any resolution of the council or of any such committee delegating power to the town-clerk to make such directions.

*17. The house and shop described by the plaintiff [256 in his declaration and particulars of demand as No. 95 Market Street, was a corner house situate at the junction of Market Street with a street called Palace Street, and abutted at the side thereof upon Palace Street.

The plaintiff included under the above description two houses of different original structure,—one, an original house No. 95 Market Street, with its front to Market Street, and a side wall upon Palace Street,—and the other a house, No. 2 Palace Street which at some time before the times mentioned in this case had been built against the back wall of the ori-

1875

Cheetham v. Mayor, &c., of Manchester.

ginal No. 95, with the front to Palace Street, the front wall in a line with the aforesaid side wall of the original No. 95, and the front door opening into Palace Street; which two houses, before the times of the acts of the defendants in respect of the aforesaid building, No. 95 Market Street, already mentioned in this case, had been converted by the plaintiff into one set of business premises in manner hereinafter stated.

The original house No. 95 contained cellars, three floors, and an attic. Each floor had a room in front; the front room on the ground floor being the shop, and rooms at the back separated from the rooms in the front by a partition wall of nine inches in thickness, while the front wall and the back wall of the said house were each fourteen inches in thickness. The house No. 2 Palace Street, also contained a cellar, three floors and an attic, but the first and second floors and the attic had been built on a little lower level than the corresponding floors of the original house, No. 95. This house, No. 2 Palace Street, came into the possession of and was occupied by the plaintiff at the same time with the original house No. 95 and the houses Nos. 97 and 99 Market Street, more than ten years ago. At that time and down to the times of the acts of the defendants hereinbefore mentioned in regard to No. 95 Market Street, the front door of the house in Palace Street had on it the number 2, meaning thereby No. 2 Palace Street, and the plaintiff was rated in respect thereof as a separate tenement from No. 95 Market Street. Before the time when the house No. 2 came into the possession and occupation of the plaintiff, a communication had been opened from the ground floor of the original No. 257] 95 to *the ground floor of No. 2; and the ground floor of No. 2 then and down to the times of the acts hereinbefore mentioned was used as a workshop for No. 95; and another communication had been opened between the attics of the two houses. The plaintiff, after coming into possession and occupation of the two houses, used the front door of No. 2 as the mode of access for his workmen to the said workshop, and nailed up the staircase leading from the front door of No. 2 within No. 2, so as to prevent persons passing thereby from the ground floor to the upper floors thereof, and made a door between the ground floor of the original No. 95 and No. 2, so as to allow persons to pass from the shop in No. 95 to the workshop behind in No. 2. He also opened doors from the first and second floors of the original house No. 95 to the corresponding floors of No. 2, so that persons passed from the said floors of the original No. 95 to the corresponding floors of No. 2 through these doors by stepping

down a step or two, such step or steps being rendered necessary by the difference of level already mentioned between the two houses. The attic of the original house No. 95 was used as a work-room, and, to secure quiet in the other parts of the premises, the staircase leading to the attic from the second floor of the house had been at some time cut away, and the only access for the work-people to the attic was through the attic already mentioned of No. 2, which last attic was reached by a back staircase in No. 2.

On the 29th of August, 1870, before certifying that there was imminent danger from the building described in the certificate of that date, and again, on the same day, after making the said certificate, Lynde inspected the whole of the above set of business premises. He stated in his evidence before the arbitrator that the business of the plaintiff appeared to be carried on throughout the whole premises; that his attention was not called on the occasion of either of his inspections by any one on the premises to there being any distinction between No. 95 and No. 2; nor was his attention called thereto by the plaintiff when he delivered to him the notice set out in paragraph 12 of the case; nor was his attention called thereto by the plaintiff or by any other person before the taking down of the aforesaid part of the building actually taken down.

*The counsel for the defendants then proposed to [258 ask Lynde the following three questions: the counsel for the plaintiff objected. The arbitrator admitted the questions, subject to the questions and answers, or any of them, being struck out by the court, if the court should be of opinion that they ought not to have been admitted:

First question. Did you see anything to call your attention to any distinction between No. 95 and what is called No. 2? *Answer.* I saw nothing to call my attention to such distinction.

Second question. Were you aware of any distinction between No. 95 and what is called No. 2? *Answer.* I was not.

Third question. When you gave that certificate, was it your intention to condemn the whole of the premises under the description in the certificate? *Answer.* Yes.

The aforesaid part of the building hereinbefore mentioned as taken down under the description in the aforesaid certificate of the 29th of August, 1870, included parts of the whole set of business premises above described.

The charges incurred by the defendants in taking down in part the said building, and recovered by them from the plain-

tiff as mentioned in paragraph 14 of the case, were the charges incurred by them for taking down the parts of the whole set of business premises above described actually taken down ; and at the proceedings for the recovery of the said charges before the stipendiary magistrate of the city, the alleged distinction between No. 95 Market Street and No. 2 Palace Street, was not mentioned or set up by the plaintiff.

Some of the goods and chattels mentioned as aforesaid in the particulars of demand as goods and chattels belonging to the plaintiff's trade and business in No. 95 Market Street, were goods and chattels in No. 2 Palace Street. The "ruling room" mentioned therein as being a room in No. 95 was the aforesaid attic of No. 2. The No. 2 "ink cellar" mentioned therein as being in No. 95 was a cellar in No. 2. And the claim therein for building materials destroyed as being in No. 95 includes building materials in No. 2.

18. The court was to be at liberty to draw inferences as a jury from the evidence set out in the case.

The questions for the court were :

First, whether the certificates of the 13th of July, 1870, 259] and of *the 29th of August, 1870, were a sufficient justification to the defendants for the execution in regard to the buildings mentioned therein respectively of the powers given to them by the acts of Parliament.

If the court should be of opinion that this question was to be answered in the affirmative, then the court was asked the second question ; but, if the court should be of opinion that this question was to be answered in the negative, then it was agreed that the case was to go back to the arbitrator to find whether at the times of the making of the said certificates there was imminent danger from the buildings mentioned in them respectively : but, if the court should be of this opinion, the court was asked to assume, for the purpose of the case, that, at the times of the making of the certificates, there was such imminent danger as therein alleged, with a view of obtaining in both events the opinion of the court upon the following questions :

Secondly, whether the acts done by the defendants in respect of the building mentioned in the certificates, or either of them, were a lawful execution in respect thereof of the powers given to them by the acts.

If the court should be of opinion that this question was to be answered in the affirmative, then the following question was submitted to the court : but, if the court should be of opinion that this question was to be answered in the negative, then the following question became unnecessary.

Thirdly, whether the certificate of the 29th of August, 1870, was sufficient to cover the aforesaid No. 2 Palace Street, so as to afford a justification to the defendants for the execution in respect thereof of the powers given to them by the aforesaid acts of Parliament.

It was agreed between the parties that, after the opinion of the court should have been obtained upon the above questions, or such of them as the court should think necessary to be answered, the case was to go back to the arbitrator to assess the damages in accordance with the answers of the court, and to amend, if necessary, the pleadings, so as to enable the plaintiff to give evidence of excess by the defendants in the execution of the powers given to them as aforesaid.

And it was further agreed, that if, in the course of such *assessment, either of the parties should desire to ob- [260 tain the opinion of the court upon any questions of law arising in such assessment, power should be given to the arbitrator to state one or more further special case or cases for the decision of the court upon such questions.

Jan. 18. Sir *John Holker*, S.G. (*Bayliss* with him), for the plaintiff: The first question is whether the certificate of the surveyor is conclusive and indisputable. That depends upon the construction of s. 38 of the act of 1867, which materially exceeds in stringency the powers contained in the Police Act of 1844. It is submitted that the certificate merely excuses what otherwise would be a trespass; and that an action will still lie against the corporation if it can be shown to the satisfaction of a jury that the imminent danger did not in fact exist. Certificates under the Metropolis Local Management Acts (') have been held by this court not to be conclusive: see *St. George, Hanover Square*, v. *Sparrow* ('); *Simpson v. Smith* (').

[LORD COLERIDGE, C.J., referred to *Bauman v. St. Pancras Vestry* ('), where the doctrine of this court in the cases cited was not approved of; and observed that the act in question says that the thing shall be done by the corporation, and that "without any presentment, notice, or other formality," which materially distinguishes those cases.]

Cooper v. Wandsworth Union (') shows that a power of this very stringent kind is not to be exercised without giving

(¹) 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 107.

(²) 16 C. B. (N.S.), 209; 33 L. J. (M.C.), 118.

(³) Law Rep., 6 C. P., 87.

(⁴) Law Rep., 2 Q. B., 528.

(⁵) 14 C. B. (N.S.), 180; 32 L. J. (C.P.), 185.

1875

Cheetham v. Mayor, &c., of Manchester.

the party to be affected by it an opportunity of being heard in defence of his property.

The next question is whether the corporation have pursued the power so vested in them by s. 38. The corporation formed no conclusion on the matter at all: all that was done was done by the surveyor acting under a supposed authority given to him by the town-clerk. By s. 4 "the corporation by the council are empowered to carry the act and the several powers thereof into execution."

261] *[DENMAN, J.: By s. 5 the signature of the town-clerk to any document is a sufficient authentication thereof by the corporation. Here, the surveyor acted upon a direction so authenticated.]

Paragraph 16 of the case shows that the corporation were never consulted, nor were the council or any committee of the council. The whole was the act of the city surveyor and the town-clerk. The corporation did nothing.

[LORD COLERIDGE, C.J. The case finds (paragraph 13) that the corporation employed the builder and paid for the work. At all events, they ratified and adopted the acts of their officers.]

Ratification may exempt those who did the acts from liability for the trespass; but that is all. It cannot make their irregular acts done by the corporation in pursuance of the powers with which the statute has armed them.

Then, the certificate as to No. 95 Market Street affords the defendants no justification for pulling down No. 2 Palace Street, which the case finds to have been an entirely separate building, in respect of which Mr. Cheetham was separately rated. The mere fact of their having been used together as one set of business premises can make no difference in this respect.

R. G. Williams, Q.C. (Sir *John Karlake, Q.C.*, and *E. Sutton* with him), for the defendants.

[LORD COLERIDGE, C.J.: We entertain no doubt upon the first point: we are all of opinion that the certificate of the city surveyor was *prima facie* conclusive. Confine your argument to the questions of ratification and the sufficiency of the certificate and notice of the 29th of August.]

The case finds that the corporation, acting upon the certificate of the surveyor, employed and paid a builder for pulling down and restoring the building. No particular mode of action is pointed out by the statute. The direction of the town-clerk was unnecessary. The corporation are to act promptly upon the certificate of their surveyor: they

are not called upon themselves to form a judgment in the matter. In the absence of a precedent authority from them, their subsequent ratification of the acts of their surveyor will do. As to the form of the certificate and notice: The two houses, No. 95 Market Street, and No. 2 Palace Street, formed one set of business premises occupied together by *the plaintiff. The terms of the notice, therefore, [262 could not possibly have misled him.

Sir *John Holker*, S.G., was heard in reply.

Cur. adv. vult.

LORD COLERIDGE, C.J.: This case turns almost entirely upon the construction of two private acts for the government of the city of Manchester, by which the mayor and corporation are empowered to pull down and repair or rebuild dangerous buildings. The case is simple in its facts. The plaintiff was the owner of several houses in Market Street, Manchester, amongst others of two numbered respectively 97 and 99, and also of No. 95, adjoining to which was another house belonging to him and being No. 2 in Palace Street; the two latter houses having been by internal communication as described in the case converted into one set of business premises. All these premises were in a dangerous condition.

As to Nos. 97 and 99 Market Street, due notice of their condition having been given to the owner in pursuance of the acts, the city surveyor, in July, 1870, caused the front walls to be pulled down and rebuilt. The work, which the case finds to have been properly done, was finished by the 14th of August, and the expenses thereby incurred were paid by the plaintiff. But on the 29th of August the building fell down.

As to No. 95 Market Street and No. 2 Palace street, the facts were these: The city surveyor having reported the premises to be dangerous, the town-clerk, purporting to act for the corporation, gave directions to the surveyor to cause the same to be taken down and repaired or rebuilt; and the work was done by persons employed and paid by the corporation, and the expenses were recovered under the act. This action is brought to recover back the moneys so paid, on the ground that the expenses were improperly and unnecessarily incurred.

Three points only are material to be considered: first, whether the certificate given by the city surveyor that there was imminent danger from the building described was conclusive: secondly, whether the corporation of Manchester

1875

Cheetham v. Mayor, &c., of Manchester.

did or did not act in accordance with the powers of their 263] acts of Parliament: thirdly, *whether the notice of the 29th of August, 1870, describing the premises to be pulled down as "No. 95 Market Street," was a sufficient notice.

The sections of the acts of Parliament upon which the questions turn are simple and plain. I will take them in chronological order. The Manchester Police Regulation Act, 1844 (7 & 8 Vict. c. xl.), which contains nearly three hundred clauses, has, amongst other provisions, a short code as to dangerous buildings, commencing with s. 58, and ending with s. 64. Sect. 58 recites that "it frequently happens that houses and other buildings and walls, are, either from litigated titles thereto, or the obstinacy, neglect, or poverty of the owners thereof, in so ruinous a condition that passengers passing by are in danger of their lives or of some bodily harm from the falling thereof," &c., and enacts that two justices may order such premises to be properly fenced until they can be proceeded against by presentment. Sect. 59 enacts that, on presentment, or notice by four householders to the town council that a building is dangerous, the surveyor shall give notice to the owner to repair the same; and by s. 61 the owner is to be charged with the expenses thereof, and by s. 62, which is a still stronger provision, the same remedy is given against the occupier, to the extent of the rent accruing due from him. That being the state of things under the act of 1844, it was, I presume, found from experience that even these very stringent enactments did not suffice to secure Manchester from the dangers recited, because in the act of 1867, 30 Vict. c. xxxvi., the powers given to the corporation and its officers were very considerably enlarged. The 38th, which is the important section of that act, enacts that, "in addition to the powers conferred by s. 50 of 7 & 8 Vict. c. xl., the corporation may, either before or after a presentment under that section, cause any building which they may consider dangerous to be watched or guarded by the police or otherwise; and, if the surveyor of the city, or in his absence, any other duly qualified surveyor, shall certify in writing that there is imminent danger from any building, the corporation shall and may, *without any presentment, notice, or other formality*, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think 264] requisite." Then s. 39 *provides that, in addition to the remedies for the recovery of the expenses under the former act, they shall be "recoverable as a penalty under

the same act, or by action in any court of competent jurisdiction."

The only condition precedent to the action of the corporation is, that "the surveyor of the city, or, in his absence, any other duly-qualified surveyor," shall certify that the building is dangerous; and then the corporation, not merely may, but *shall* cause them to be taken down or repaired.

It may be material to notice two other sections of the act of 1867 which were alluded to in the argument, viz., ss. 4 and 5. By s. 4, "the corporation by the council are empowered to carry the act and the several powers thereof into execution;" and s. 5 provides that, if any notice or other document under the act require authentication by the corporation, the signature of the town-clerk thereto shall be a sufficient authentication.

That being the state of the law, let us see what was done here. And, first, as to the houses Nos. 97 and 99 Market Street. The premises being dangerous, Lynde, the city surveyor, on the 13th of July, 1870, certified to the corporation that there was imminent danger from "the building situate in and No. 97 and 99 Market Street," belonging to the plaintiff. Upon that certificate, the town-clerk of Manchester on the same day issued a direction to the surveyor in these terms: "The corporation of the city of Manchester hereby direct you to cause the building mentioned in your certificate of this date to be taken down either wholly or in part, or to be repaired or secured in such manner as you shall think requisite." The surveyor thereupon took down and rebuilt the front wall of the building, the work being done, as is found by the case, by persons employed and paid by the corporation, and without negligence: and the expenses incurred were paid by the plaintiff. The building subsequently fell down.

Shortly afterwards, viz., on the 29th of August, a similar certificate was given by the surveyor as to the "building" No. 95 Market Street, and the town-clerk issued a similar direction to the surveyor to pull down the building described in that certificate; and, after notice to the plaintiff, the owner, the surveyor proceeded to take down certain parts of the building indicated; and in *February, [265 1871, the corporation recovered from the plaintiff before the stipendiary magistrate, under ss. 39 and 119 of the act of 1867, the charges so incurred by them. Nothing was said either in the surveyor's certificate, or in the town-clerk's direction to the surveyor, or in the notice to the plaintiff, about No. 2 Palace Street.

1875

Cheetham v. Mayor, &c., of Manchester.

These are all the material facts. It appears that a certificate was given by the city surveyor, with regard to all the buildings in question, that there was imminent danger therefrom. So far, therefore, the condition precedent contained in s. 38 of the act of 1867 has been complied with. But, if the point I am about to refer to be tenable, it was necessary to go further. Now, the first objection taken to the certificate is, that it is not conclusive as to the imminence of the danger, and that, although the certificate might exempt the corporation from liability to an action of trespass, still they must make compensation to the party injured if it should afterwards turn out that the certificate was contrary to the fact or the direction founded thereon given without authority. I am, however, of opinion that the certificate was intended to be and is made conclusive of the fact stated therein; and that, on production of that certificate, the corporation are protected in doing the act and entitled to recover the expenses incurred by them in doing it. The language of s. 38 is not permissive merely: it is imperative—if the surveyor shall certify the building to be dangerous, the corporation *shall* cause it to be taken down, and this without any presentment, notice, or other formality. The cases which were cited for the purpose of showing that the certificate of the surveyor is not conclusive, viz., *Cooper v. Wandsworth District Board of Works* ⁽¹⁾, *St. George, Hanover Square, v. Sparrow* ⁽²⁾, and *Simpson v. Smith* ⁽³⁾, arose either upon the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), or the Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 107, s. 75), the language of which, though somewhat like that of the section now under consideration, is not nearly so strong. Although the Court of Queen's Bench, in *Bauman v. Vestry of St. Pancras* ⁽⁴⁾, 266] *intimated an opinion that the certificate of the superintending architect was conclusive as to the general line of building, yet, sitting as I am as a judge of the Court of Common Pleas, if it were necessary to decide, and the words to be construed were the same, I should have felt myself bound to act upon the decisions here rather than upon the opinion expressed in the case in the Queen's Bench, and to hold that the certificate was examinable in after-proceedings. But it is not necessary upon this occasion to consider those cases, inasmuch as there were no such words in the clauses then under consideration as there are in the clause

⁽¹⁾ 14 C. B. (N.S.), 180; 32 L. J. (C.P.), 185.

⁽²⁾ 16 C. B. (N.S.), 209; 33 L. J. ⁽³⁾ Law Rep., 6 C. P., 87.

(M.C.), 118.

⁽⁴⁾ Law Rep., 2 Q. B., 528.

which we have to construe,—“without any presentment, notice, or other formality.” It is enough, therefore, to say that those cases have no application to the present; and that I am clearly of opinion, upon the words of s. 38 of the act of 1867, that the certificate of the surveyor is and was intended to be conclusive, and that the corporation were justified in acting upon it and were bound to act upon it.

Then, the Solicitor-General argued that, conceding that to be so, still the *corporation* must act in the matter, and here they have not done so. Now, the words are, “the corporation shall and may, without any presentment, notice, or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite.” The directions given to the city surveyor on the 13th of July and 29th of August, he says, the case expressly finds to have been given, not by the corporation, but by the town-clerk. They were not given at any meeting of the council or of any committee of the council; nor was there any intention expressed by the corporation to delegate to the town-clerk authority to give such directions; but he took upon himself to give them: and therefore, the Solicitor-General contends that the corporation have not pursued the powers of the act. Now, the act of 1867 provides in s. 4 that the corporation by the council are to carry it into execution: but s. 5 enacts that every notice or other document which requires authentication shall be considered to be sufficiently authenticated if signed by the town-clerk: and here the directions were duly signed by the town-clerk: but the purport to be given by the corporation of the city of Manchester; and it is found in both instances that the persons who did the work were [267 employed and paid by the corporation, and that they were so employed to do work which the city surveyor had certified to be necessary.

I am of opinion, upon two grounds, that the act has been complied with here. In the first place, it is found in the case that the corporation have acted in the matter. The orders were given in their name, authenticated by the signature of the town-clerk; and they employed and paid the persons who did the work, and therefore they must be taken to have considered that it was requisite that it should be done; and they received from the owner the amount of the expenses they had incurred in doing it. Upon a case in which it is agreed that the court shall draw inferences of fact, what other inference can we draw than that the acts done were authorized by the corporation? Farther, it ap-

1875

Cheetham v. Mayor, &c., of Manchester.

pears to me that there is abundant evidence of ratification by them of the acts of their officers: and I see no reason why that should not suffice to bring them within the provisions of the act. It has been suggested by the Solicitor-General that, although there might be a sufficient ratification to save the persons who did the acts from being liable in trespass, still that would not make their acts the acts of the corporation,—in other words, that the ratification might enure against the corporation, but not for their benefit. I am not, however, aware of any authority, and no argument occurs to my mind, upon which the distinction suggested could be founded. If a ratification at all, it is difficult to see how it can be a ratification of the qualified kind contended for. I am therefore of opinion that the second point urged on behalf of the plaintiff also fails, and that the corporation have acted within the authority conferred upon them by the act.

The third point is of a somewhat technical character. It is said that the certificate of the surveyor was bad, and therefore what was done under it cannot be justified. This objection does not apply to the houses No. 97 and 99 Market Street. As to No. 95 Market Street and No. 2 Palace Street, the difficulty is this: The certificate describes the thing aimed at as a "building," and in the schedule it is called "Shop, No. 95 Market Street." It appears from the statement in paragraph 17 of the case that the building intended to be thus described consisted not only of No. 95 Market Street, *but also of No. 2 Palace Street, which though rated as a separate tenement had for some years been occupied by the plaintiff together with No. 95 Market Street, as one set of business premises, with internal communications both on the ground floor and upon an upper floor, access to the top floor of 95 Market Street being gained only by passing up the staircase of No. 2 Palace Street. So far as could be seen by an inspection of the business premises on the ground floor, the whole formed one shop or building. Under these circumstances, it is said that the certificate and notice did not point at No. 2 Palace Street at all, and, professing to cover both premises, covered neither. I am of opinion that the notice was sufficient. The plaintiff could not have been misled by it. The two houses were evidently intended to be described under the word "building," which it may be observed was used in the former notice as comprehending Nos. 97 and 99 Market Street. I am therefore of opinion that the third objection also fails.

Some remarks have been made as to the stringent charac-

ter of the provisions in s. 38 of the act of 1867. I agree that those provisions are somewhat stringent. But it seems to me that the act is a very salutary one; and, if general convenience and the interests of the public require them, however stringent enactments may be, private rights and interests must give way, and the law must not be suffered to remain a dead letter. For these reasons I am of opinion that the defendants are entitled to the judgment of the court.

KEATING, J.: I am of the same opinion: and, after the minute and careful statement of the facts by my Lord, I have but little to add. As to the first point, I think it would be impossible to give any effect to the act unless we held the certificate of the surveyor to be conclusive. The provision in s. 38 is, no doubt, a very stringent one, vesting in the surveyor, as it does, absolute power to say that a man's house shall be pulled down. The Legislature, however, appears to have thought it necessary to confer upon him this power; and it is our business to see that their intention is carried out. It would be impossible for the corporation to act at all if a question could in every case be raised before a jury as to the propriety of the certificate. With regard to the *cases cited, as I was a party to the decision of the [269 first of them, viz., *St. George, Hanover Square, v. Sparrow* (¹), I may be allowed to observe, with the greatest deference for the Court of Queen's Bench, that I think this court was justified in holding that the certificate of the surveyor was not conclusive, inasmuch as the act of Parliament then under consideration interposed a judicial tribunal between the builder and the vestry. It is enough, however, to say that the provisions of the act now before us are totally different. The question upon which I have entertained some doubt is, whether the ratification by the corporation of the acts of its officers was equivalent to an authority given *ab initio*. But, upon consideration, I come to the conclusion at which my Lord has arrived, viz., that the ratification was sufficient. The corporation were bound to act upon the certificate of their surveyor. The order or direction of the town-clerk ought, strictly speaking, perhaps, to have been given after some consideration by the corporation. But the case finds that the building was taken down by persons employed and paid by them. The utmost that can be said, I think, is, that the certificate of the surveyor and the acts done under it were so ratified by the corporation as to make the whole their acts. As to the third point, I entirely agree

(¹) 16 C. B. (N.S.), 209; 33 L. J. (M.C.), 118.

1875

Cheetham v. Mayor, &c., of Manchester.

with my Lord that the description given of the premises in the certificate and notice was sufficient.

DENMAN, J.: I also agree that there must be judgment for the defendants, and I rest my judgment on s. 38 of the 30 Vict. c. xxxvi., and on that only, some light being thrown on that enactment by the state of the law under the act of 1844. I also think that none of the cases cited have any bearing upon this, the objects and provisions of the statutes upon which they were decided being totally different from those of the act which we are now called upon to construe. The first question is, was the certificate of the city surveyor conclusive? For the reasons given by my Lord and my Brother Keating I think it was. Looking at the subject-matter with which s. 38 of the act of 1867 was dealing, it would be impossible to work out the object the Legislature had in view unless the certificate were held to be conclusive. 270] It was necessary that *some person should have power to form a judgment upon which prompt action could be taken. The suggestion of the Solicitor-General that the council or a committee should first consider the matter, is utterly impracticable. I cannot conceive anything more improbable than that the Legislature should have intended that the opinion of a jury should be taken in each case as to whether there was or was not imminent danger from the building. Then it is urged by the Solicitor-General that the corporation ought themselves to form a judgment, and not rest merely upon the certificate of the surveyor and at once act upon that. I am of opinion that that is not the proper construction of the act. The assumption is that the building is in imminent danger of falling. Prompt action is necessary. Armed with the authorization of the town-clerk, the surveyor is bound to do the work at once, unless the corporation interfere and forbid it. By the necessity of the thing, the doing of the work is the act of the corporation itself. That again turns upon the construction to be put upon the enactment in question. The provisions of the earlier act were evidently found not to be sufficiently stringent to meet the difficulties of the case, and too cumbrous, and therefore the enactment in s. 38 of the act of 1867 was passed. The next argument was, that the second certificate and notice did not sufficiently identify the premises to be pulled down. If that were so, there would be no justification for the acts of the corporation. But here we have power reserved to us to draw inferences from the facts; and, looking at the statements in paragraph 17 as to the way in which the premises No. 95 Market Street, and No. 2 Palace Street, were occu-

pied by the plaintiff, and at the internal communications between them, the only inference I am able to draw is that No. 2 Palace Street was occupied by the plaintiff as a substantial part of No. 95 Market Street, and that they were fairly described as such in the certificate. Upon all the points, therefore, I agree that there must be judgment for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Gregory, Rowcliffes & Co., for W. L. Welsh, Manchester.*

Attorney for defendants: *R. Freer Austin, for Frederick Stephen Austin, Manchester.*

See Dillon's Munic. Corp., §§ 338, 756-9.

[Law Reports, 10 Common Pleas, 271.]

Feb. 25, 1875.

***ANGLO-EGYPTIAN NAVIGATION COMPANY V. RENNIE [271 and Another.**

Contract for Work to be done upon a Ship—Property in Articles manufactured for the Purposes of such Contract—Payments during the Progress of the Work—Completion of Contract prevented by Loss of the Ship—Money had and received—Failure of Consideration.

The defendants contracted with the plaintiffs to make and supply new boilers and certain new machinery for a steamship of the plaintiffs, and to alter the engines of such steamship into compound surface condensing-engines, according to a specification.

The engines, boilers, and connections were, by the contract, to be completed in every way ready for sea so far as specified, and tried under steam by the engineers (the defendants) previous to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector.

The price of the work was to be £5,800, and was to be paid as the work progressed, in the following manner, viz., £2,000 when the boilers were plated, and £2,000 when the whole of the work was ready for fixing on board, and the balance, £1,800, when the work was fully completed and tried under steam. These payments were only to be made on the certificate of the plaintiffs' inspector. The old materials removed from the ship were to become the property of the defendants. The specification contained elaborate provisions as to the fitting and fixing the new boilers and machinery on board the ship, and the adaptation of the old machinery to the new. The boilers and other new machinery contracted for were completed, and ready to be fixed on board, and one instalment of £2,000 had been paid under the contract, when the ship was lost by perils of the sea.

The value of the work actually done by the defendants under the contract amounted to £4,118. The second instalment of £2,000 was subsequently paid, at the time of which payment the plaintiffs knew of the loss of the ship, but the defendants did not.

The plaintiffs claimed delivery of the boilers and other machinery completed under the contract, and this being refused, brought an action for the detention of the same, or to recover back the £4,000 paid by them to the defendants:

Held, that the contract was an intire and indivisible contract for work to be done upon the plaintiffs' ship for a certain price, from further performance of which both

1875

Anglo-Egyptian Navigation Company v. Rennie.

parties were released by the loss of the ship; that the property in the articles manufactured was not intended to pass until they were fixed on board the ship; and that consequently the plaintiffs were not entitled to the boilers and machinery, nor could they recover the £4,000 already paid as upon a failure of consideration.

SPECIAL CASE stated in an action for the detention of certain boilers and machinery, and for the recovery of two sums of £2,000 paid by the plaintiffs to the defendants.

The facts of the case sufficiently appear from the judgment.

272] **H. Matthews*, Q.C. (*Arthur Wilson* with him), for the plaintiffs: The property in the boilers and machinery so far as they were finished passed to the plaintiffs under the contract. The general rule no doubt, is, that, under a contract for the manufacture of a chattel, nothing passes to the buyer until the chattel is in a complete state and has been appropriated to the contract. But where, as here, the work has been done under the inspection of a person employed by the buyer, and moneys have been paid upon his certificate that it has reached certain prescribed stages, that has been held to be a sufficient appropriation of the article in its then state to take the case out of the general rule: *Woods v. Russell* (1); *Wood v. Bell* (2).

[LORD COLERIDGE, C.J.: The argument on the other side will probably be that this was a contract for work to be done at an entire price, and consequently that nothing passed to the plaintiffs until fixed on board the vessel.]

The same argument might have been urged in the cases cited. Mr. Benjamin, in his *Treatise on the Sale of Personal Property*, 2d ed., p. 245, speaking of *Clarke v. Spence* (3), says: "Much stress has been laid, in argument, upon a passage in the opinion delivered by Bayley, J., in *Atkinson v. Bell* (4), in which he said that 'the foundation of the decision in *Woods v. Russell* (1) was, that, as by the contract, given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money; that was a purchase of the specific articles of which the ship was made.' In commenting upon this dictum, Williams, J., showed that in *Woods v. Russell* (1) the decision did not turn upon any such point, although there were extra-judicial expressions strongly tending to that view; and he continued (5): 'If it be intended in this passage that the specific appropriation of the

(1) 5 B. & Ald., 942.

(2) 6 E. & B., 355; 25 L. J. (Q.B.), 321.

(3) 4 Ad. & E., 448.

(4) 8 B. & C., 277, 282.

(5) 5 B. & Ald., at p. 467.

parts of a vessel while in progress, however made, of itself vests the property in the person who gives the order, the proposition in so general a form may be doubtful. . . . Until the last of the necessary materials be added, the vessel is not *complete; the thing contracted for is [273 not in existence; for, the contract is for a complete vessel, not for parts of a vessel, and we have not been able to find any authority for saying that while the thing contracted for is not in existence as a whole and is incomplete, the general property in such parts of it as are from time to time constructed shall vest in the purchaser, except the above passage in the case of *Woods v. Russell* (*). The court, however, held that the passage cited from *Woods v. Russell* (*) was founded on the notion that provisions for the payment regulated by particular stages of the work is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is an equivalent to an express provision that, on payment of the first instalment, the general property in so much of the vessel as is then constructed shall rest in the purchaser.' The court, with the intimation of a wish that the intention of the parties had been expressed in less ambiguous terms, deliberately adopted this dictum from *Woods v. Russell* (*) as a rule of construction by which, in similar ship-building contracts, the parties are held to have by implication evinced an intention that the property shall pass, notwithstanding the general rule to the contrary. The law thus established has remained unshaken to the present time."

[DENMAN, J.: This is substantially a contract for work and labor, and not a contract of sale.]

In *Wilkins v. Bromhead* (*), where a carpenter was employed to make a greenhouse, the whole of which was completed but not permanently fixed together, and the agreed price paid, but the greenhouse at the employer's request was retained on the maker's premises until after he had become bankrupt, this court held that there had been a sufficient appropriation to pass the property in the greenhouse to the employer. *Clarke v. Spence* (*), where the contract was for the building of a ship for a given sum, to be paid by certain instalments as the work progressed, was a decision to the same effect. And this was followed by *Wood v. Bell* (*).

[LORD COLERIDGE, C.J.: The passage cited by Mr. Benjamin from the judgment of Williams, J., in *Clarke v.*

(1) 5 B. & Ald., at p. 946.

(2) 6 M. & G., 963.

(3) 4 Ad. & E., 448.

(4) 6 E. & B., 355; 25 L. J. (Q.B.), 321.

1875

Anglo-Egyptian Navigation Company v. Rennie.

274] *Spence* (') shows *there is no appropriation until the ship is complete. The judgment goes on to show (') that payment is wholly immaterial to the vesting of the property.]

Then the vessel in this case, the *Scanderia*, having been lost at sea, both parties were excused from further proceeding with the contract. Where a contract impliedly assumes the existence of a particular or specific person or thing, it is to be construed in the absence of an express or implied warranty that the existence of the person or thing shall continue, as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible, from such person or thing ceasing to exist: *Laughter's Case* ('); *Williams v. Hide* ('); *Taylor v. Caldwell* ('); *Boast v. Firth* ('); *Appleby v. Meyers* ('). In delivering the judgment of the Court of Error in the last cited case, Blackburn, J., says ('): "We think that where, as in the present case, the premises are destroyed [or, in this case, the ship is lost] without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither."

Then, as to the defendants' claim of lien. It appears from the case that the defendants have done work under the contract to the value of £4,118, and that they have received two payments of £2,000 each. The boilers were to be fixed on board the *Scanderia* before their claim for the balance of the agreed price, £1,800, could arise; and then they would have parted with them. The claim of lien, therefore, is inconsistent.

[KEATING, J.: You can only deprive them of their lien by resorting to the contract: and that has been put an end to by the act of God.

GROVE, J., referred to *Jervis v. Tompkinson* (').]

Then, the defendants have waived their lien, if they ever had it, by claiming £1,800, when the utmost they could be entitled to was £118: *Dirks v. Richards* ('); *Kerford v. Mondel* (').

275] *If the contract is wholly rescinded, or if the property in the boilers did not pass to the plaintiffs, they have paid £4,000 upon a consideration which has failed; and consequently they are entitled to recover it back.

(1) 4 Ad. & E., 448.

(2) 4 Ad. & E., at p. 469.

(3) 5 Co. Rep., 21 b.

(4) Palm., 548.

(5) 3 B. & S., 826; 32 L. J. (Q.B.), 164.

(6) Law Rep., 4 C. P., 1.

(7) Law Rep., 1 C. P., 615; in error, Law Rep., 2 C. P., 651.

(8) Law Rep., 2 C. P., at p. 659.

(9) 1 H. & N., 195.

(10) 4 M. & G., 574; 26 L. J. (Ex.), 41.

(11) 28 L. J. (Ex.), 303.

Benjamin, Q.C.: The contract in the present case is not one of sale, as to which very different considerations would apply, but one of work and labor. It is an entire contract for the repair of a ship with materials partly old and partly new. The complicated nature of the work to be done before the contract was completed renders it impossible to attribute the payments made to any particular part of the work. The payments were simply intended to be payments on account of the whole price of the entire work. Apart from any specific provision for payment as the work progressed, the defendants could not have recovered a penny until the whole of the work was completed: *Appleby v. Meyers* ⁽¹⁾. However little remained to be done they must, if the vessel was lost, have lost all claim to remuneration. They expressly stipulate for payment as the work progresses, in order to prevent such a result, and to throw some portion of the risk on the other party. There is nothing in such a provision to show that there was any intention that the property in boilers and other articles, constructed with a view to the contract, but not affixed to the ship, should pass upon the payment of these instalments. The plaintiffs have no right to split up the contract, and take part of what was to be done as against part payment of the price. But for the express stipulation the defendants on the loss of the vessel must have borne all the loss; by that stipulation they have thrown the loss on the plaintiffs. But this does not affect the construction of the contract in other respects: it remains an entire and indivisible contract. The plaintiffs knew of the loss of the ship when they paid the second instalment. Consequently the money paid cannot be said to have been paid upon a consideration which has since failed. The sums of money to be paid in advance do not correspond to the value of the articles manufactured at the time of such payments. Besides, the defendants have not received the old materials, and cannot now receive them.

Arthur Wilson, in reply: The action is not upon the contract; *the contract has not been, and never can [276 be, carried out; the plaintiffs' claim must depend on the fact of the property having passed or upon failure of consideration. It is conceded that if this were to be looked upon as the case of a contract of sale the property would have passed. The distinction relied upon is that this is not a contract to build a ship, but to repair one. It is contended that upon the true construction of the contract it consists of two component parts, which may be severed. It is a con-

(1) Law Rep., 2 C. P., 651.

1875

Anglo-Egyptian Navigation Company v. Rennie.

tract for the sale of certain machinery, plus a contract to do work in fixing it and in altering part of the existing machinery. A sale is simply a transfer of property for consideration. *Quoad* the things to be made this is a contract of sale. All that has to be done with respect to them is to make them according to the specifications.

The substance of the contract must be looked at, and it will be found, when so regarded, that the bulk of it is for the manufacture of certain engines to be fixed on board the plaintiffs' ship. The stipulation for payment in instalments is for the protection of both parties, that the one party may not lose the price of the things provided by the loss of the ship before the contract is completed, and, on the other hand, that the other party may not have to pay the price and receive no equivalent for it. There is no reason why it should be construed so as to shift all the risk from one side to the other.

It is quite consistent with the terms of the contract, and manifestly in accordance with the justice of the case, that the true construction is that the property should pass in the articles, when manufactured from time to time, on payment of the instalments due.

He cited *Lee v. Griffin* (').

Cur. adv. vult.

Feb. 25. The judgment of the court (Lord Coleridge, C.J., and Grove and Denman, J.J., (')) was delivered by

DENMAN, J.: This was a special case stated without pleadings in an action in which the plaintiffs claimed to recover 277] cover certain *boilers and machinery detained by the defendants, with damages for their detention, or to recover back two sums of £2,000 each paid by the plaintiffs to the defendants as stated in the case. In case our judgment should be for the plaintiffs for the recovery of the goods, judgment was to be entered for £5,000, to be reduced to 40s. on the goods being delivered up. In case we should decide for the plaintiffs on the other ground, judgment was to be entered for £4,000. The two questions for the court therefore are, whether, under the circumstances of the case, either detainee or money had and received could be maintained.

The material facts of the case were as follows: On the 18th of December, 1871, the plaintiffs, a shipping company in London, being owners of two steamships, the *Minia* and the *Scanderia*, entered into a written contract with the de-

(') 1 B. & S., 272; 30 L. J. (Q.B.), 252. ment, had resigned at the end of Hilary

(2) Keating, J., who heard the argu- Term.

fendants, engineers in London, which is set out in the special case, and the terms of which, so far as they are material, are as follows:

The engineers agree to make and supply to the company new marine boilers and various parts of machinery for the screw-steamers *Minia* and *Scandaria* belonging to the company, and to alter the engines of those steamers into compound surface condensing engines, according to specification annexed. The engines and boilers and connections are to be completed in every way ready for sea so far as specified, and tried under steam by the engineers previous to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector.

The work to be commenced without delay, and completed with all reasonable dispatch. Due notice shall be given by the company to the engineers of the date at which the steamers will be placed in their hands after the work is ready, to have the engines completed. Each of the steamers shall be completed ready for sea within sixty working days from the date at which she is placed in the hands of the engineers.

The price to be paid by the company to the engineers in respect of this agreement shall be the sum of £5,800 for each steamer, payable as the work progresses, in the following manner, viz., When the boilers are plated, £2,000, half cash, half by the company's acceptance at four months' date; when the whole of the work is ready for fixing on board, £2,000, half cash, half by the company's acceptance [278 at four months' date; when each steamer is fully completed and tried under steam, £1,800, whereof £1,000 cash, and £800 in acceptances at four months. All bills to be approved.

The contract then contained a guarantee by the engineers against bad materials or workmanship, and an undertaking to make good for six months; and then it continued as follows:

"All the work hereby contracted to be done by the engineers shall be executed to the satisfaction of John Pile, or other the company's inspector for the time being; and all the payments agreed to be made by the company shall only be made on the certificate of such inspector that the conditions entitling the engineers to receive such payment have been fulfilled."

The contract contained an arbitration clause.

The specification referred to in the contract was headed "The work hereby specified to be done to each of the steam-

1875

Anglo-Egyptian Navigation Company v. Rennie.

ers Minia and Scandaria," and contained, amongst other matters, the following provisions and requirements:

"Four new boilers of oval form to be fitted and fixed on board; each boiler to have two furnaces, and to be provided with all necessary fittings," &c.; "the boilers to be cleaded with felt and wood, or patent cement, as may be determined, with all necessary piping to fit and fix them to the engines;" funnel casings to be removed and replaced; old boilers to be cut up in ship, and removed in pieces, so as not to disturb the deck.

Then followed provisions relating to alterations to be made in the cylinders, and providing several articles, such as new cylinder covers to be put on the old cylinders, with glands, slide-rods, and "all that may be necessary to make the engines complete compound and surface condensing engines."

Then followed a provision that a surface condenser containing 2,000 cubic feet of tube cooling surface was to be supplied; and immediately afterwards it was specified as follows: "One of the present air-pumps to be arranged as a circulating pump; both the pump and the other air-pump now in the ship to have foot valves fitted, if they are not so at present;" "waste-water valves to be fitted to ship; the present waste-water valve chest to remain for the air-pump's discharge;" "all present piping in connection with boilers to be condemned, and replaced with copper piping sufficient 279] *to bear the increased pressure;" "all brasses to be set together, and *the whole job* to be put in thorough working order so far as the new work is concerned;" "in conclusion, it is intended that the engineers shall remove the present boilers and such parts of the machinery *as may be necessary* to make the above alterations, *giving new boilers and complete machinery instead*, and so as to comply with the requirements of the Board of Trade, whose certificate they are to obtain as far as the work which they engage to do extends."

The case finds that under the contract the whole of the old materials to be necessarily taken from each ship by reason of the execution of the work contracted to be done would become the property of the defendants, and that the value of such old materials in each ship was £353. At the date of the contract, the 18th of December, 1871, the Scandaria was in the port of London. The contract, so far as relates to the Minia, was performed on both sides; and no question arises as to that ship.

On the 28th of June, 1872, the plaintiffs gave notice to the

defendants that the Scanderia was ready to be placed in their hands on the 1st of August next, to receive her boilers and machinery. But, upon hearing from the defendants on the 28th of June that they could not promise to be ready by the 1st of August, the plaintiffs determined to send her on another voyage. She sailed from Cardiff accordingly in August, and on her return voyage was lost by perils of the sea.

On the 15th of August, 1872, the boilers for the Scanderia were plated. On the 27th of August the plaintiffs' inspector certified that the defendants were entitled to receive the first sum of £2,000 in respect of that ship; and on the 28th of August the plaintiffs paid the same in the manner provided by the contract.

On the 4th of January, 1873, the whole of the work was ready for fixing on board the Scanderia, and on the 15th the plaintiffs' inspector so certified, and that the conditions entitling the defendants to the second sum of £2,000 had been fulfilled; and the plaintiffs on the 17th of January paid that sum as before. At the time of the last mentioned payment, the plaintiffs knew, but the defendants did not know, of the loss of the vessel.

On the 25th of April, 1873, the defendants, having heard of the *loss of the Scanderia, wrote requesting the plaintiffs "to pay the balance due on the contract, amounting to £1,800." On the 26th the plaintiffs replied that, "looking at the work which the defendants had not been called upon to perform, they considered that they had already paid all that they could be required to pay in respect of the engines, if indeed they had not already paid more than a proportionate part of the contract price."

On the 10th of May, 1873, the plaintiffs gave notice to the defendants stating that the contract of the 18th of December, 1871, having come to an end, they required the defendants to deliver to the plaintiffs the boilers and other machinery and things made by the defendants under the contract, and, in default of delivery, threatened proceedings. On the 21st of May the defendants' solicitors wrote, stating that the defendants were willing to hand over the boilers and other machinery asked for, "on being paid the amount of their lien." Subsequently, on the 23d and 28th of May, in answer to letters of inquiry as to their meaning, the defendants' solicitors wrote that the amount claimed by the defendants as their lien was the amount of the last instalment under the contract, viz., £1,800. They, however, proposed that the question should be disposed of under the arbitration clause, which offer was declined by the plaintiffs.

The case further stated: "The total sums paid under the contract by the plaintiffs to the defendants are, £5,800 in respect of the Minia, and the two above-mentioned sums of £2,000 each in respect of the Scanderia. The defendants have received the old materials, valued at £353, out of the Minia. No offer of any further sum has been made by the plaintiffs to the defendants. The defendants, at the date when they heard of the loss of the Scanderia, had completed 71 per cent. of the whole work contracted for in respect of the Scanderia. At that date the price of labor and materials was higher than at the date of the contract."

Upon the above state of facts, it was contended on behalf of the plaintiffs,—first, that the property in the boilers and machinery and other matters prepared by the defendants and ready to be fixed in the Scanderia had passed to the plaintiffs. It was admitted that, in general, a contract for 281] the manufacture of articles *to be fitted to a house or a ship would not pass the property upon the mere manufacture of the articles according to the contract: but it was contended that, under the present contract, inasmuch as the boilers were to be inspected by the plaintiffs' inspector, and the defendants were to be paid £2,000 upon his certificate that the conditions entitling the defendants to be paid were fulfilled, and the contract itself stated that such payments were to be made "as the work progresses," we ought to hold that, upon each of these instalments being paid and the proper certificates given, so much of the work was irrevocably appropriated to the plaintiffs, and that therefore the plaintiffs were entitled to recover damages for the detention at all events of that portion of the work done when the second instalment of £2,000 was paid.

In support of this contention several cases were cited,—especially *Clarke v. Spence* (1), *Woods v. Russell* (2), and *Wood v. Bell* (3). But, in truth, none of those cases afford material assistance towards the decision of the present case. They were all cases, not of a contract for work and materials to be supplied to a ship by way of repairs or alterations, but contracts for building and supplying a ship; and the question which arose in all those cases was, whether the ship itself or the materials ready to be fitted to it had or had not passed to the purchaser at the time of the bankruptcy of the builder. There was nothing in two of those cases to be done by the purchaser except to pay the price contracted for:

(1) 4 Ad. & E., 448.

(2) 5 B. & Ald., 942.

(3) 5 E. & B., 772; 25 L. J. (Q.B.), 148; in error, 6 E. & B., 355; 25 L. J. (Q.B.), 321.

and in *Woods v. Russell* (1) the property in the ship was held to have passed because the ship-builder signed the certificate to enable the defendant to have the ship registered in his name, and thereby, as the court thought, consented that the general property in the ship should be considered as from that time being in the defendant.

In the present case there is no such fact, and reliance is wholly placed on the contract between the parties and the payments under it.

In *Clarke v. Spence* (2), undoubtedly, the court treated a provision for the payment for a ship regulated by particular stages of the work as equivalent to an express provision that on payment of *the first instalment, the general [282] property in so much of the vessel as is then constructed should vest in the purchaser. But that, again, was the case of a contract in which nothing was to be done beyond the supply of a chattel by the one party and the payment at certain stages of its progress by the other. And the case of *Laidler v. Burlinson* (3) shows how strictly confined to that simple state of things the doctrine supported by *Clarke v. Spence* (4) is held to be.

Wood v. Bell (5) turned not upon the contract only, but upon the conduct of the parties. Lord Campbell, indeed, lays very great stress upon the terms of the contract, which made the payments dependent on the vessel's being built to certain specific stages by certain appointed days; and speaks of this provision as "an indication of intention substantially the same as if the days had not been fixed, but the payments made to be due expressly when those stages had been reached." But *Wood v. Bell* (6), again, was the case of a contract for the supply of a ship to be built by A. for B., which in our opinion is a very different sort of contract from that with which we have to deal in the present case.

In answer to the plaintiffs' claim for the detention of the goods, the defendants' counsel contended that the contract upon which the question here arises was not a contract for the sale of goods, nor one capable of being so dealt with as regards any part of it. He maintained that it was in substance a contract for work and labor to be done upon two ships belonging to the plaintiffs, and containing provisions wholly inconsistent with the view that the property in any part of the boilers and machinery intended for the *Scandaria*

(1) 5 B. & Ald., 942.

(2) 4 Ad. & E., 448.

(3) 2 M. & W., 602.

(4) 5 E. & B., 772; 25 L. J. (Q.B.), 148; in error, 6 E. & B., 355; 25 L. J. (Q.B.), 321.

1875

Anglo-Egyptian Navigation Company v. Rennie.

would pass until actually fixed on board the Scanderia. He relied strongly on the provision that the old materials were to be received by the defendants under the contract, and upon the several provisions of the specification to the effect that numerous alterations were to be made which could only be decided upon when the ship was in the hands of the defendants, and generally upon the mixed and complicated character of the job contracted for.

283] *We are of opinion that, upon the true construction of the contract, it was, as contended by the defendants' counsel, substantially a contract for work and labor to be done by the defendants for the plaintiffs, and that, looking to the complicated nature of the work to be done, it is impossible to hold that the provisions as to payment were intended to have the effect of passing the property in each portion of work certified by the inspector as properly done to the plaintiffs as and when his certificate was given. If, indeed, we could see anything upon the face of the contract to show that the two sums of £2,000 were to be considered, as between the parties, to be in payment of the work certified to be done, neither more nor less, we should be disposed to hold that the plaintiffs' contention was well founded; but we do not think that this was the intention of the contract. We think that the two payments of £2,000 were intended only to be made as payments on account of the contract to be performed, as a whole; and that they were not intended to appropriate so much money to so much work or materials. The case finds that, at the time at which the defendants were informed of the loss of the Scanderia, seventy-one per cent. of the whole of the work contracted to be done had been completed; and it is difficult to see what more could have been done beyond what would have been included in the first two certificates, until the ship had come into the defendants' hands.

Seventy-one per cent. of £5,800 amounts to £4,118, a sum materially in excess of the £4,000 paid; and we think it can hardly have been in contemplation of the parties that in any case the defendants should be bound to do a portion of the work contracted for, and hand it over to the plaintiffs for a less than its proportionate value of the whole work to be done; and that, too, without receiving the old materials (worth £353), which they were to receive in case the contract had been fully performed.

A careful perusal of the specification seems to us to establish that the contract was for one entire job, for which £5,800 was to be received on one side and £353 value in old materials on the other. The full performance of this contract

having been rendered impossible by the loss of the *Scanderia*, we think that the plaintiffs cannot maintain that any property has passed, and that therefore the claim in detinue fails.

*The second ground upon which the plaintiffs rested [284] was a claim to be repaid the two sums of £2,000 paid by them, as money had and received. With regard to the first of these sums, it seems to us to be clear that it was paid in pursuance of the contract, and under such circumstances that the parties could not be placed in *statu quo* by its repayment. The boilers certified to be plated may have been either of more or less value than £2,000, or of more or less profit or loss relatively to the rest of the subject-matter of the contract. The defendants are guilty of no wrong in not having fitted the boilers in question to the plaintiffs' ship. It seems quite plain that, if the ship had perished during the currency of the bill at four months given for the second £1,000 payable upon the plating of these boilers, that would have been no answer, as between the parties, to an action on the bill.

With regard to the second £2,000, there is a still further objection to its recovery in an action for money had and received. Before the plaintiffs paid that sum to the defendants, they were aware of the loss of the *Scanderia*; and the defendants were not aware of it. It cannot, therefore, be maintained that it was paid by the plaintiffs upon a consideration which has since failed; for it was paid with knowledge of the facts, which were unknown to the defendants.

We are therefore of opinion that the plaintiffs have failed to sustain either of the grounds upon which alone they contended that any right of action against the defendants could be supported, and that we are bound to give judgment for the defendants.

Judgment for the defendants.

Attorney for plaintiffs: *G. M. Clements, for Bircham & Co.*

Attorneys for defendants: *Cattarns, Jehu & Cattarns.*

See note 10 Eng. Rep., 117.

The general rule is that under a contract for the building of a vessel or other thing, no property vests in the person for whom it is agreed to be built until it is finished and delivered. *Andrews v. Durant*, 11 N. Y., 35; see *S. C.* on second appeal, 18 N. Y., 496; *Happy v. Mosher*, 47 Barb., 503; *Low v. Austin*, 25 Barb., 26. 20 N. Y., 181; *McConihe v. New York, etc.*, 20 N. Y., 495; *Seymour v. Montgomery*, 4 Abbott's Court App. Dec., 207, 1 Keyes, 463; *Decker v. Fur-*

niss, 14 N. Y., 611; *Dyckman v. Valiente*, 43 Barb., 142; *Sage v. Slentz*, 23 Ohio St. Rep., 1; *Hesser v. Wilson*, 36 Iowa, 152; *Scully v. Shakespear*, 75 Penn. St. R., 297; *Hiscox v. Harbeck*, 2 Bosw., 506; *Comfort v. Kiersted*, 26 Barb., 472; *Brown v. Morgan*, 2 Bosw., 485; *Feld v. Moore*, Lalor's Sup., 418; see *Matter of Lambton*, L. R., 10 Chy. App., 405, post p.—, or to appear in 13 Eng. R.

As to what is finishing and delivering: *Goddard v. Binney*, 115 Mass.,

1875

Jebesen v. East and West India Dock Co.

450; *Dexter v. Bevier*, 42 Barb., 573, 577; see *Andrew v. Newcomb*, 32 N. Y., 417.

The rule is the same where certain portions of the contract price are agreed to be paid to the builder at specified stages of the work, and where an agent of the person for whom the article is to be constructed, is to and does superintend and approve the materials and work: *Andrews v. Durant*, 11 N. Y., 85; 10 Eng. Rep., 117 note.

Therefore, where A. contracted to build for B. a vessel of specified dimensions, and deliver it to him complete on a day named, for the price of \$5,000: three thousand to be paid at specified stages of the work, and \$2,000 when it was completed and delivered, the workmanship and materials to be inspected and approved, as the work progressed, by the superintendent of B., which was done: Held, that B. had no property in the vessel until it was completed: *Andrews v. Durant*, 11 N. Y., 85; 10 Eng. R., 117 note; see *Manger v. Crosby*, 117 Mass., 330.

Where payment was made upon a

portrait partly painted to be transferred to another for finishing, held an exception to the general rule and that title passed to the person so paying: *Wright v. O'Brien*, 5 Daly, 54.

Where a house builder contracted to build a house and find the materials, for which he was to receive his pay as the work advanced, and after putting up and inclosing the house, worked up, in the house, plank preparatory to erecting columns for a piazza to the building and removed the same, as a mere matter of convenience, to an adjoining house, where they were levied upon by virtue of an attachment against the builder; it was held, in an action by the employer for the taking of such materials, that the plaintiff, although he had made advances as the work progressed, was not entitled to maintain an action: the materials being personal property, and not passing to the plaintiff until delivery or until affixed to the freehold: *Johnson v. Hunt*, 11 Wend., 135, *Chambers v. Board, etc.*, 60 Mo., 370; *Abbott v. Blossom*, 66 Barb., 353.

[Law Reports, 10 Common Pleas, 300.]

Feb. 25, 1875.

300] *JEBESEN and Others v. EAST AND WEST INDIA DOCK COMPANY.

Damages, Measure of—Joint Contractors—Set-off—Recoupment of some of several Persons jointly contracted with.

In an action for breach of a contract for the quick discharge of a ship made with several persons jointly, where some of the plaintiffs had made profits by reason of such breach of contract which they would not otherwise have made, through another ship in which they were interested having been substituted for the purpose for which the former ship was required:

Held, that the amount of the joint damages could not be reduced by the profits so made by some of the plaintiffs individually.

ACTION for breach of a contract to discharge a ship of the plaintiffs' in the defendants' docks without delay, whereby the plaintiffs lost the use of the ship for a long time, and lost the passage-money payable by certain emigrants, and had to pay large sums of money for the support of the said emigrants⁽¹⁾.

The facts as proved at the trial, and the grounds on which leave was reserved to move to reduce the damages found for the plaintiffs, sufficiently appear from the judgment.

⁽¹⁾ It is not necessary to set out the pleadings in detail, inasmuch as the only

question was as to the amount of the damages for the breach of the contract.

A rule *nisi* having been obtained in pursuance of the leave reserved,

Thesiger, Q.C., and *Webster*, showed cause: It is contended by the defendants that, in ascertaining the damages, the fact that some of the plaintiffs were recouped by reason of the gains made by another ship in which they were interested must be taken into account. It is submitted that there is no authority for such a mode of estimating the damages in the case of joint contractors. If the plaintiffs instead of being joint contractors, had been a corporation, it is quite clear that the fact of some of the individual members of the corporation having been recouped in the same way could not be taken into account in estimating the damages. The case of partners is so far analogous to that of a corporation, that it is the body of partners as a single legal entity that is entitled to the damages, *not the differ- [301] ent individual partners. In contemplation of law the party recouped is not the same as the party damaged.

The excessive complication that the admission of such a principle as that contended for by the defendants would produce is a sufficient reason against it. It would be impossible to set reasonable limits to its application, and it might lead in many cases to collateral inquiries of which it is difficult to see the end.

This is substantially an attempt to set off several profits against a joint damage.

[They cited *Yates v. Whyte* (1), and *Bradburn v. Great Western Ry. Co.* (2)]

Watkin Williams, Q.C., and *C. S. C. Bowen*, supported the rule: Some of the plaintiffs have been recouped the damages that they sustained by the breach of contract by the gains that accrued to them through the carriage of the emigrants by another ship in which they were interested. It may be admitted that the plaintiffs are entitled to their damages as a single legal entity, but the question is to what amount of damages are they so entitled? The amount of damage which the plaintiffs are collectively entitled to recover is the aggregate of the damages which each has sustained individually. The case of *Yates v. Whyte* (1) is not in point, because it is clear in such a case the underwriters would be entitled to the damages recovered. If the principle of *Bradburn v. Great Western Ry. Co.* (2) were applied to the present case, it would go too far, because it would go the length of showing that if there had only been one contractor, and he

(1) 4 Bing. (N.C), 272.

(2) Law Rep., 10 Ex., 1.

1875

Jebsen v. East and West India Dock Co.

had been recouped all his damages, that circumstance could not be taken in account.

Suppose, in such a case as the present, A. owned one sixty-fourth of the one ship and B. sixty-three sixty-fourths, and B. owned the whole of the other ship, could it be said that the fact of A. owning one sixty-fourth let in all the damages which B. could not have recovered if he had been sole owner of both ships? It is a fallacy to say that a partnership is analogous to a corporation in this respect. A partnership is simply an aggregate of individuals, and to ascertain the loss of a partnership you must ascertain the loss to each individual. The English law only knows of two sorts of 302] *persons, individuals and corporations. It is true that the interest of the individual members of a partnership is joint; they can only sue or be sued jointly. The interest which they have in the damages when recovered is joint, and a court of law cannot go into the question how far each is interested in the joint damages. But the only mode of ascertaining the joint damages is by ascertaining the amount to which each has been damaged. The greatest injustice and absurdity must follow from any other mode of assessment. Suppose two persons are jointly interested in two carriages which carry a certain number of passengers, and in consequence of a breach of contract to repair these carriages, they cannot carry certain passengers in them; but suppose they are each severally interested in two other carriages which will carry the same number of passengers each, and the consequence of the breach of contract is that the same number of passengers are conveyed in the second pair of carriages. If the owners of the carriages can jointly recover the whole damages, without regard to what they were recouped in their separate capacities, each will really get twice as much as if the contract had not been broken.

Suppose, again, a gang of laborers, jointly contracting to do a piece of work, wrongfully dismissed: each goes and separately procures work which brings him in as much as the job he has lost. Could it be suggested that the whole gang suing jointly could recover the aggregate sum to be paid to the whole, without taking into account in reduction of damages the amount each was recouped by the employment he procured in substitution for that which he had lost as a member of the gang?

Considerations derived from the law of set-off do not apply, inasmuch as they depend on the words of the statutes relating to set-off.

Cur. adv. vult.

Feb. 25. The judgment of the court (Lord Coleridge, C.J., and Grove and Denman, JJ.)⁽¹⁾, was read by

DENMAN, J.: This was an action tried before me at the sittings at Guildhall after Easter Term, 1874, to recover damages for the *detention of a steamer of the plaintiffs, [303 called the Peter Jebsen, by the default of the defendants. The verdict was for the plaintiffs, and it is not disputed that for some amount the verdict must stand.

By the limitation placed by the court upon the rule on which we are now to give judgment, the questions became reduced to the single one whether the plaintiffs were entitled to retain a sum of £1,444 14s. 6d. which was assessed by the jury, or such portion of that sum as an arbitrator might award, if the court should be of opinion that they were entitled in point of law to retain any of it. The point was elaborately argued before us last term; and we are now to give judgment upon it.

The question arose thus: There were two lines of steamers from Norway to America called respectively the Nordske Lloyd's and the Nordske American lines. The Peter Jebsen belonged to the Nordske Lloyd's. She was under contract to carry a cargo of emigrants and merchandise from Bergen to New York at the time when she was detained in the defendants' dock, and in order to fulfil her contract she ought to have been at Bergen at the end of June or the beginning of July, 1872, so as to start from Bergen, as she had been advertised to do, on the 4th of July. Sufficient notice of this contract had been given to the defendants to make them liable for the loss occasioned to the plaintiffs by the breach of it, if, as was the fact, the defendants' conduct caused that breach: and this loss is to be taken, for the purpose of our judgment, at £1,444 14s. 6d.

It is said, however, that the plaintiffs have not sustained these damages in fact, and that therefore in law they are not entitled to retain them. The Peter Jebsen, as has been said, belonged to the Nordske Lloyd's line. There were two other steamers, the Harold Harfager and the S. Olaf, which belonged to the Nordske American line. The 240 emigrants who were booked for America by the Peter Jebsen were indeed lost to her. But 202 of them went to America on the 10th of July by the Harold Harfager; and twenty-five more of them went to America on the 16th of August by the S. Olaf. It is as to these that the substantial question arises.

The two lines of ships which have been mentioned are

⁽¹⁾ Keating, J., who had heard the argument, retired at the end of Hilary Term, but is understood to have concurred in the decision arrived at.

1875

Jebesen v. East and West India Dock Co.

304] associations *of ships and not of owners. There is one body of directors and one set of laws for each of the lines respectively. But the owners in each ship in each line are not the same. Each ship has its own set of owners; and the same man may be and in fact is part owner in various proportions of different ships in different lines. In the instances of these particular ships, the facts were thus: The Peter Jebesen was divided into 192 shares, and the twelve plaintiffs owned them. The Harold Harfager was divided into 360 shares, which were owned by 33 owners; and five of these 33 were five of the plaintiffs. The S. Olaf was divided into 300 shares, which were owned by 26 owners, and five of these 26 were five of the plaintiffs, but not all the same five as were part owners in the Harold Harfager.

Now, it is said the Harold Harfager and the S. Olaf profited by the loss of the Peter Jebesen; they carried emigrants whom they would not have carried but for the detention of the Peter Jebesen; some of the plaintiffs, therefore, gained by the default of the defendants; and such gain to individual plaintiffs, which, though with difficulty, is yet capable of being ascertained, must therefore be taken in reduction of the damages which the whole body of plaintiffs is entitled to.

The statement of such a proposition in its bare simplicity is perhaps a sufficient answer to it. We need not insist upon the difficult and complicated inquiries which in a multitude of easily suggested cases (some were suggested in the ingenious argument before us) would render any result being arrived at by a jury practically impossible.

The absence of authority for a claim by defendants like this, which yet if well founded must have arisen in many cases, affords a strong presumption against its having any legal foundation. It is true that there must be a first instance in every claim, and that ingenuity often for the first time suggests a point which has escaped observation, and which yet, when brought to the test of argument, is found to be a sound one. But this is a point which must have arisen so frequently that it is to us incredible that, if sound, it never should have been taken.

The contention of the defendants, however, is not only without authority; it is against the principle of cases decided 305] under *analogous circumstances. It should seem that, if there had been but one owner of the Peter Jebesen, and the same person had been sole owner of the Harold Harfager and of the S. Olaf, the profits made by him as owner of the two latter could not be deducted from the damages sustained

by him as owner of the former. *Yates v. Whyte* (*) decided that a defendant in a collision case could not deduct from the amount of damages to be paid by him a sum of money paid to the plaintiff by insurers in respect of such damage. It may be said that the authority of this case is not direct, because the insurance was a contract of indemnity, and the insurers might have recovered over from the plaintiff. The decision in the case, however, and in that of *Mason v. Sainsbury* (†),—itself cited with approbation in *Yates v. Whyte* (‡),—both stand on grounds independent of this consideration. But, whatever weight may be due to this consideration, the case of *Bradburn v. Great Western Ry. Co.* (§) cannot be so qualified. That was an action for injuries in a railway accident: it was held that, in estimating the damages, the defendants could not take into account the amount which the plaintiff received from an accidental insurance policy. There, the contract was not one of indemnity. The judges held that the contract into which the plaintiff had entered was that, in consideration of the payment of premiums, he (the plaintiff) should, on the happening of a certain event, receive a sum of money. The event happened, and the benefit of the contract accrued to the plaintiff through the defendants' default. But the benefit could not be deducted from the damages for which the defendants were liable. This case appears to us to be perfectly well decided, and to be in point against the defendants in the case before us.

Furthermore, although not in form, it is in substance an attempt to set off against joint damage a several benefit.

We were told by Mr. Bowen, in a very able argument, that he relied upon a distinction, which no doubt exists, but which we think will not avail the defendants, between partnerships and corporations. For the purposes of actions for breach of contract, part-owners of ships, who are working the ship together for profit, are in the same position as partners; and, where partnerships sue for breach of [306 contract, the damages must be confined to those sustained by the partnership; the joint damage only can be considered. It seems to follow that any benefit arising out of the breach of contract, assuming that it can be taken at all into account in reduction of damages, must be a joint benefit, or one accruing to the partnership. In such a case as that put in argument, of a gang with whom a joint contract had been made being dismissed in breach of it, it is clear enough that the gang can sue. It was held, in the case of *The Tonbridge*

* (1) 4 Bing. N. C., 272.

(2) 3 Doug., 61.

(3) Law Rep., 10 Ex., 1.

1875

Carr v. London and North Western Railway Co.

Wells dippers, *Weller v. Baker* (1), by Lord Chief Justice Wilmot and the Court of Common Pleas (2), that, if a stranger disturbed them in their employment, they were all jointly concerned in point of interest, and could all jointly sue in an action on the case. It follows that only something in which the benefit was joint could, if anything could, be considered in reduction of damage. If the matter now attempted to be set off in substance were a set-off in form, there would be no room for the defendants' contention; for, a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one. The benefit here, as it is a gain from third parties, is, not a set-off; but the same rules of sense and convenience apply as if it were.

On no ground, therefore, do we think the defendants entitled to succeed; and the rule must be discharged.

Rule discharged.

Attorneys for plaintiffs: *Lowless & Co.*

Attorneys for defendants: *Freshfields & Williams.*

(1) 2 Wils., 414.

(2) See fourth point of the judgment, 2 Wils., p. 423.

[Law Reports, 10 Common Pleas, 307.]

Jan. 20, 1875.

307] *CARR V. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—Common Carriers—Negligence—Estoppel.

The plaintiff bought goods which were to be consigned to him at Liverpool from St. Helen's by the defendants' railway. On the 7th of July, 1873, the plaintiff received advice-notes from the defendants informing him that *three* parcels of goods had been received by them for his account, and that they held them subject to his order and to the payment of rent and charges. The plaintiff immediately instructed his broker to sell the whole. Early in August the plaintiff received invoices of the three parcels from his vendors, and paid for the whole by an acceptance which was duly honored. The goods were sold on the 21st of August, and the rent and charges on the *three* parcels were paid to the defendants by the broker: but it turned out that *two* parcels only had been delivered to the defendants (the third still remaining on the premises of the vendors), and the plaintiff was obliged to pay to his vendees £5 4s. 1d., the difference between the price at which they had bought the third parcel and what they had to pay for other goods. The defendants' servants were aware on the 9th of July that they had never received the third parcel, but no notice of the mistake was given to the plaintiff until the 1st of September, after the goods had been resold and the charges paid:

Held, in a special action for non-delivery of the third parcel, with a count in trover, that the defendants were not estopped from showing that the goods had never reached their hands; and consequently could neither be liable in trover nor for breach of contract in not delivering the goods.

Ordinary definitions of an estoppel *in pais*.

THE first count of the declaration was for non-delivery of fifteen casks of bleaching-powder, marked B. Nos. 16 to 30, which had been intrusted to the defendants by the plaintiff. The second count was trover for the goods in the first count mentioned: and there were the common money counts.

The defendants pleaded not guilty, a denial of the breaches alleged, except as to £1 10s. 0½d., never indebted, and as to that sum payment into court. Issue thereon.

The cause was tried before the assessor of the Court of Passage at Liverpool on the 2d of July last. The facts are fully set out in the written judgment of the court.

On the part of the plaintiff it was submitted that, having informed the plaintiff that they had received the goods for his account, and having been paid by him the warehouse-rent and charges on them, and having thus induced the plaintiff to make a contract for the sale of them upon [308 the faith of their representation that the whole of the goods were in their warehouse at his disposal, the defendants were estopped from saying that they had not received them, and consequently were liable in trover for their value; or, at all events, that they were bound to indemnify the plaintiff for the loss he had sustained in having to buy other goods in order to perform his contract with his vendees.

For the defendants it was submitted that, inasmuch as the casks B. 16 to 30 had never reached their hands, they could not be liable in trover for them; and that there was nothing to go to the jury, there being no damages which could in any sense be said to be the natural or reasonable result of any breach of contract by the defendants.

The learned assessor left it to the jury to say whether and to what amount the plaintiff had been damaged by the defendants' negligence. The jury found for the plaintiff for the full amount claimed, viz., £62 19s. 9d. and interest from the time the bill was due; and also £5 4s. 1d., the amount of loss the plaintiff had sustained on the purchase of other goods by his vendees. And, in answer to a question put to them at the request of the plaintiff's counsel, they further found that the defendants knew of the mistake on the 9th of July, and that there was no sufficient intimation of it by them to the plaintiff.

A verdict was thereupon entered for the defendants, with leave to the plaintiff to move this court to enter a verdict for the plaintiff for £70 or such other sum as the court should order, if they should be of opinion, on the present or any

1875

Carr v. London and North Western Railway Co.

amended state of the pleadings, that the plaintiff was entitled to recover.

Nov. 4. *Gully* obtained a rule *nisi* accordingly. He proposed to add the following amended or additional count:

"That the defendants were carriers of goods to Liverpool, and warehousemen at Liverpool, and the defendants gave notice to the plaintiff that certain goods of the plaintiff had been consigned to the plaintiff at Liverpool; and thereupon, in consideration that the plaintiff would promise to pay to the defendants rent or warehouse charges in respect of the goods described in such notice from the date of the said no-309] tice until such time as the plaintiff *should require the defendants to deliver the same to him or to his order, the defendants promised and warranted to the plaintiff that the said goods had been received by them, and were then in their possession, and that they would, upon request, and upon payment of such charges as aforesaid, deliver the same to the plaintiff or to his order: and all things happened and all times elapsed and all conditions were fulfilled necessary to entitle the plaintiff to a performance by the defendants of their said promise, and to bring this suit for the breaches hereinafter mentioned; yet the defendants had not then received, and had not then in their possession, the said goods; and the defendants further broke their said agreement in this, that they did not deliver the said goods to the plaintiff, although they were requested so to do and the said charges were paid; and by reason of the premises the plaintiff lost the said goods and the value thereof, and incurred loss and expense in procuring other goods in place thereof."

Nov. 25. *Graham* and *French* showed cause: There was no evidence of a conversion, inasmuch as it was admitted that the goods in question never reached the hands of the company at all: and, notwithstanding the finding of the jury that the company did not give sufficient intimation of their mistake to the plaintiff, they were not estopped from showing the truth. The advice-note was not such a representation as the plaintiff was entitled to act upon as he did. His position was in no respect altered or prejudiced by it: the goods are still in the possession of his vendors, and he may have them whenever he chooses. The case does not fall within any of the illustrations of estoppels *in pais* given by Parke, B., in *Freeman v. Cooke* ('). The representation, to amount to an estoppel, must be wilful, and made with intent that it shall be acted upon by the party to whom it

(') 2 Ex., 654; 18 L. J. (Ex.), 117.

is made: *Pickard v. Sears* ('); *Gregg v. Wells* ('); *Evans v. Collins* ('). The doctrine laid down by Parke, B., in *Freeman v. Cooke* (') is approved of by Blackburn, J., in *Swan v. North British Australasian Co.* ('). And see the notes to *Duchess of Kingston's Case* ('). This precise question *arose in a case of *Scales v. London and South Western Ry. Co.* ('). There the defendants were carriers from France to London, and were in the habit of receiving goods consigned to the plaintiff, advising him of their arrival, and holding them until the plaintiff sent to fetch them away. A parcel having arrived not addressed, the defendants, assuming that the goods were for the plaintiff, advised him of their arrival, and he paid them the charges thereon and accepted a draft for the price of the goods. In trover against the company, it was held that they were not estopped from showing that they had not in fact received the goods for the plaintiff.

Gully, in support of the rule: The finding of the jury establishes that there was a representation by the defendants which was untrue, and that the plaintiff, acting upon that representation, sold the goods, and thereby sustained a loss which but for the representation of the defendants would not have fallen upon him. Having induced the plaintiff to believe that they held the goods at his disposal, and the plaintiff having acted upon that belief, the defendants were estopped from averring that the goods had never reached their hands. For this *Freeman v. Cooke* (') is a distinct authority.

[DENMAN, J.: The mistake originated with the plaintiff's vendors, the Bridgewater Smelting Company. All that the finding of the jury amounts to is that the defendants, though informed that their advice-note was founded upon a mistake, negligently omitted to rectify it.]

In *Freeman v. Cooke* ('), Parke, B., after stating the rule as laid down in *Pickard v. Sears* (') to be, "that, whenever one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time," goes on ('): "By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to

(') 6 Ad. & E., 469.

(') 10 Ad. & E., 90.

(') 5 Q. B., 804.

(') 2 Ex. 634; 18 L. J. (Ex.), 117.

(') 2 H. & C., 175, 181; 32 L. J. (Ex.), 273.

(') 2 Sm. L. C., 6th ed., 677, 789.

(') Argued in the Queen's Bench on the 9th of May, 1872, but not reported.

(') 2 Ex., at p. 663.

1875

Carr v. London and North Western Railway Co.

be true which he knows to be untrue, at least that he *means* 311] his representation to be acted upon, and that *it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." The present case falls precisely within that principle, which was acted upon in the case of *Re Bahia and San Francisco Ry. Co. and Tritton* (1): and see *Stonard v. Dunkin* (2). Having given the plaintiff information which was calculated to mislead and which did mislead him, it was the defendants' duty, the moment they discovered their mistake, to give the plaintiff notice of it: and this the jury find they did not do.

[DENMAN, J.: How can the defendants be guilty of a conversion of goods which it is admitted they never had in their possession?]

The goods were not found until after the commencement of the action. Even if there is no estoppel, the advice-note amounts to a contract to deliver the goods to the plaintiff, for the breach of which the defendants are clearly liable.

Cur. adv. vult.

Jan. 20. The judgment of the court (Brett and Denman, JJ.), was delivered by

BRETT, J.: This case was tried in the Passage Court of Liverpool. A verdict was by the direction of the learned assessor who tried the cause entered for the defendants. Leave was given to the plaintiff to move this court to enter the verdict for the plaintiff for £70 or such other sum as the court should be of opinion that, on the present or any amended pleadings, the plaintiff was entitled to recover.

The facts given in evidence on the trial were that the plaintiff, who carried on business at Liverpool as Carr & Co., entered, in February, 1873, into a contract with Allan & Co. of Glasgow for the purchase of thirty-five tons of bleaching-powder, to be delivered in lots of about five tons per month. Allan & Co., in order to fulfil their contract, entered into one with 312] the Bridgewater Smelting *Company, who were manufacturers at St. Helen's, for the supply of thirty-five tons of bleaching-powder to their order. The works of the smelting company were situated at about a mile and a half from a goods office of the defendants at St. Helen's. The smelting company had a private line to join the defendants' line,

(1) Law Rep., 3 Q. B., 584.

(2) 2 Camp., 344.

and were supplied by the defendants with wagons to be loaded by the smelting company at their works, and to be left at the junction to be picked up by a passing goods train. In ordinary course of business, when the smelting company had loaded and addressed a wagon for any consignee, they sent to the defendants a "consignment-note," containing the date of the loading, the nature of the goods loaded, the marks and numbers of the packages, the station to which the goods were ordered, and the name of the consignee to whose order the goods were to be delivered. The consignment-note was acknowledged by the railway company, but with the remark "not seen." Upon the receipt of the consignment-note, a clerk of the defendants would advise it to the station to which the goods were consigned, and a clerk at that station would thereupon send an "advice-note" to the consignee. The description of the goods in the advice-note was in ordinary course a copy of the description in the consignment-note. This was because the goods were "not seen" by the defendants' servant when sent forward.

Powder being manufactured, an invoice was on the 30th of May sent by the smelting company to Allan & Co., and another from Allan & Co. to the plaintiff, for the price of fourteen casks, A. 1 to 14. On the 30th of June, an invoice was sent by the smelting company to Allan & Co., and another by Allan & Co. to the plaintiff, for the price of fifteen casks, B. 1 to 15. And on the same day, the 30th of June, other invoices were sent in the same way for fifteen casks, B. 16 to 30. On the 3d of July the plaintiff, having notice that the bleaching-powder was to come from the smelting company at St. Helen's, wrote to them "to have the ten tons of bleach A. 1 to 14 and B. 1 to 15 sent to Wapping Station, Liverpool, to the plaintiff's order." No such letter was ever sent by the plaintiff with regard to casks marked and numbered B. 16 to 30.

On the 5th of July the smelting company loaded wagons with fourteen casks of bleaching-powder marked and numbered A. 1 to A. 14, and with fifteen casks marked and numbered B. 1 to B. 15; but they *never loaded any wagon [313 with casks marked and numbered B. 16 to B. 30, though they had marked and numbered fifteen casks with those marks and numbers in their warehouse.

On the 5th of July, the shipping clerk of the smelting company forwarded to the defendants' station at St. Helen's a consignment-note in the following form: "Delivered in good order, &c., in wagons numbered, &c., fourteen casks bleaching-powder, mark A. Nos. 1/14, to be forwarded to

Wapping Station, Liverpool, for the order of Carr & Co." On the same day, the clerk sent a similar consignment-note for fifteen casks, but by mistake gave the marks and numbers as "Mark B. Nos. 16/30." These consignment-notes were acknowledged by the defendants' clerk at St. Helen's, but with the remark "not seen," and the consignments were by the defendants' clerks at St. Helen's advised by the same marks and numbers to the defendants' clerks at Liverpool. On the 7th of July, the defendants' clerks at Liverpool sent to the plaintiff an "advice-note," as follows:

"Advice of goods. Wapping Station, 7th July.

"The undermentioned goods consigned to you are advised here to your address. I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company, not as common carriers, but as warehousemen, at owner's risk, &c., and subject to the usual warehouse charges in addition to the charges now advised.

From	No. of Packages.	Species of Goods.	Marks.	Weights.	Total.
St. Helen's	15	Casks B. Powder	B. 16/30	..	1 0 10
10 $\frac{6}{442}$	14	„	A. 1/14	..	0 17 11"

On the same 7th of July, the shipping clerk of the smelting company discovered his mistake in stating one of the consignments sent forward to be fifteen casks B. 16 to 30. No such casks were ever delivered by him into any wagon of the defendants. He thereupon took to the defendants' office at St. Helen's an amended consignment-note, described on the face as "corrected," and giving the marks and numbers of the fifteen casks as B. 1 to 15. *This was advised to the defendants' clerks at Wapping, who thereupon forwarded to the plaintiff, but not on paper of the color ordinarily used for corrected advice-notes, an advice-note in the following form:

"Advice of Goods. 9th July.

"The undermentioned goods consigned to you are advised here to your address. I will thank you for instructions," &c.

This was in the ordinary printed form as before, but was then filled up as follows:

From	No. of Packages.	Species of Goods.	Marks.	Weights.	Total.
St. Helen's 12 ⁵ / ₅₇₅	15	Casks B. Powder	B. 1/15	..	0 19 0

“Originally entered per our invoice 10⁴/₇ July 5th, 1873.”

The number 10⁴/₇ is a reference to the number on the former advice-note.

Afterwards, in August, the smelting company making another mistake, sent to Allan & Co., and they sent to the plaintiff, an invoice for the price of three parcels of goods as delivered, viz., for fourteen casks A. 1 to 14, for fifteen casks B. 1 to 15, and for fifteen casks B. 16 to 30; and the plaintiffs paid such invoice by acceptance.

On the 21st of August, the plaintiff's broker presented at the defendants' office at Liverpool the advice-notes of the 5th and 7th of July, in order that, according to custom, the warehouse charges might be added to them; and the defendants' clerks, not noticing and not being informed that the second was in correction of part of the first, added to the first the warehouse rent for two parcels, A. 1 to 14 and B. 16 to 30, and to the second for B. 1 to 15, and received payment.

Afterwards, the casks A. 1 to 14, and B. 1 to 15, were delivered to the plaintiff's vendees; but, when they demanded fifteen other casks B. 16 to 30, the mistake was discovered and made known to all parties. The plaintiff thereupon desired, that, if no such casks had been delivered for him to the defendants, none such should then be accepted by them on his account.

*The plaintiff's purchasers then bought in fifteen [315 casks against him at a loss to him of £5 4s. 1d., the value of the fifteen casks B. 16 to 30 being said to be in August, if they had been sent forward, £65.

The present action was brought by the plaintiff against the defendants to recover the value of fifteen casks B. 16 to 30, and the damages to him by reason of the loss on the purchase against him,—first, on a count in trover,—and, secondly, on a count alleging a bailment to the defendants upon an undertaking by them to deliver to the plaintiff's order, on demand. The plaintiff's counsel, at the hearing before us, proposed a further count, averring that, in consideration of the plaintiff's paying rent for fifteen casks B. 16 to 30, according to notice from the defendants, they war-

1875

Carr v. London and North Western Railway Co.

ranted that they had such casks in their possession, and promised to deliver them on demand.

The jury at the trial, in answer to the only question left to them, found "that the defendants knew of the mistake on the 9th of July, and that there was no sufficient intimation by the defendants to the plaintiff of the mistake." They founded the latter part of their decision, as we were informed, upon the fact that the corrected advice-note was not on paper of the usual color.

Upon these facts, it was argued before us on behalf of the plaintiff, that the defendants were estopped from alleging that they had not received fifteen casks B. 16 to 30; that, consequently, they had refused to deliver on demand fifteen such casks, which they could not deny that they had received; and that they must therefore be taken to be guilty of a conversion of fifteen such casks; and that, if not liable in trover, they were liable upon a contract to be implied from their representations or conduct, and a consequent alteration of the position of the plaintiff acting on the faith of such representations or conduct.

It was argued on behalf of the defendants that there was no estoppel, and, if no estoppel, no such contract as is relied on in either the original or the amended count.

If there be no estoppel, we are of opinion that there is no such contract as has been relied on, or as could make the defendants liable for breach of contract. If there is no estoppel, the case must be considered upon the basis that no 316] such casks as fifteen casks *B. 16 to 30 were ever in the possession of the defendants. Then there is no foundation for the contract set forth in the declaration, which rests upon a promise founded upon the consideration of an alleged delivery of fifteen casks to the defendants. And, as to the amended count, there is no evidence that the defendants ever intended, that is to say, had it in their minds, to enter into a contract of guarantee such as is alleged in the amended count, or that any statement of theirs caused or could reasonably cause the plaintiff to trust in such a guarantee as a contract of guarantee. In either view, therefore, if there is no estoppel, there was no contract. If there is no estoppel, it is obvious that there is no case in trover: but, if there is an estoppel, then the defendants being prohibited from averring that they did not as carriers receive such goods upon an undertaking to the consignor to deliver them to the order of the plaintiff, and there being a demand and refusal, it seems to us impossible to say that a jury ought not to find a conversion and a verdict for the

plaintiff on the count in trover. It may be also that, if the defendants are estopped from denying that they had such goods, they have made themselves liable to the plaintiff in contract to deliver to him the goods on demand. If there be an estoppel, a question may arise as to the amount of the damages. The question of liability, as it seems to us, depends entirely upon whether the defendants are or are not estopped in an action brought against them by the plaintiff. In order to justify the plaintiff in his assertion that the defendants are estopped as against him from denying that they were in possession of fifteen casks of bleaching-powder B. 16 to 30, which they were, if in possession of them, bound to deliver to him, he must bring the case within one of the recognized propositions of an estoppel *in pais*.

One such proposition is, if a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

The present case cannot be brought within that proposition, because it is not pretended that there was any statement or *conduct false to the knowledge of the defendants or any of their servants. [317

Another recognized proposition seems to be, that, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estoppel from denying the existence of such a state of facts.

And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

It seems to us that the plaintiff has failed to bring the present case within the bounds of either of those propositions.

As to the first, it cannot, as it seems to us, be truly affirmed that the defendants intended any representation of

1875

Carr v. London and North Western Railway Co.

theirs to be acted upon by the plaintiff in the way of reselling the goods. There is no evidence of a custom to resell upon the faith of such an advice-note as a railway company sends to a consignee: the only intention on the part of the defendants which can be properly inferred from the sending of an advice-note is, that the consignee should send for the goods. If the first intention could be inferred, the plaintiff did not, in reselling, act upon any representation of the defendants, for he resold before they made any communication to him. In reselling, he neither acted upon nor was damaged by reason of any representation of theirs. And, if the second intention be inferred, the defendant did not act upon it by sending for the goods: he never did send for them. And, if it can be said that by means of his vendees he did, he suffered no damage by reason of sending for them: any damage which he suffered was by reason of the resale. Neither the payment of the warehouse-rent nor of the invoice price can be relied upon as damage resulting from the conduct relied upon to support an estoppel to deny 318] the *possession of the goods, because either damage can be rectified without the intervention of such an estoppel: there is no consideration for either payment: both were made under a mistake of facts.

As to the second proposition, it is open to the same objections, and to this further one, that, notwithstanding the finding of the jury, we are not prepared to say that the plaintiff's servants could have been misled, if they had acted with reasonable care and attention. The original advice-note sent to the plaintiff contained two lots of casks: one of fourteen casks, marked A. 1 to 14; and another of fifteen casks, marked B. 16 to 30: the corrected advice-note speaks of one lot of fifteen casks; if it refers at all to the former advice-note, it must refer to the lot of fifteen casks, and not to that of fourteen casks. It does, we think, refer distinctly to the former advice-note, by the entry "originally entered per our invoice, 10 6-442, 5th July, 1873." The date is that of the former advice-note, and the figures 10 6-442 are those of the former advice-note. The smallest attention to this entry must, in our opinion, have led the plaintiff's clerks to see that the second advice-note referred to the lot of fifteen casks marked and numbered B. 16 to 30 in the first advice-note, and was intended to correct the marks to B. 1 to 15.

The finding of the jury does not affect the conduct of the plaintiff's servants, but amounts only to a finding that the defendants' servants did not take the best course.

There is yet another proposition as to estoppel. If, in

the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist.

Here, again, we are of opinion that the plaintiff fails to bring the present case within the proposition. The jury have not found negligence on the part of the defendants; and, as everything on their part seems to have been in ordinary course, unless it be the difference of color of the paper of the corrected advice-note, we are not prepared to say that that alone amounts to culpable *negligence. If [319 there was negligence, it did not induce the plaintiff to resell. The resale was the only cause of damage to plaintiff.

We are, therefore, of opinion that the plaintiff has failed to make out that the defendants were estopped; and are of opinion that the verdict was properly entered for the defendants, and that this rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *Bridger & Collins, for Francis & Collins, Liverpool.*

Attorney for defendants: *R. F. Roberts.*

As a general rule a party will be concluded from denying his own acts or admissions which are expressly designed to influence the conduct of another, and did influence it, and when such denial will operate to the injury of the latter: *Welland Canal Co. v. Hathaway*, 8 Wend., 488; *Sparrow v. Kingman*, 1 N. Y., 253, 256; *Frost v. Saratoga, etc.*, 5 Denio, 154; *Gillespie v. Carpenter*, 25 How. Prac., 203, S. C. 1 Rob., 65, affirmed in Court of Appeals June, 1868; *Young v. Bushnell*, 8 Bosw., 1; *Brown v. Bowen*, 30 N. Y., 541; *Hawley v. Griswold*, 42 Barb., 18; *Broom's Leg. Max.* (7th Am. ed.), 290-293; 1 Story's Eq. Jur., § 885, *et seq.*; *Smith v. Kay*, 7 House Lords Cases, 750; *Ramsden v. Thornton*, L. R., 1 H. L., 129.

See *Jorden v. Money*, 5 House Lords Cases, 185, 213-4.

An estoppel *in pais* is never allowed to be used as an instrument of fraud;

it is to be resorted to solely as a means to prevent injustice; always as a shield but never as a sword: *Pierrepoint v. Barnard*, 5 Barb., 364, reversed but on another point, 6 N. Y., 279; *Lounsbury v. Depeu*, 28 Barb., 44.

The doctrine of estoppel cannot be applied to give validity to an illegal act: *N. Y., etc., v. Schuyler*, 88 Barb., 535; see S. C. 84 N. Y., 30.

No one can be estopped from refusing to do an illegal act: *N. Y., etc., v. Schuyler*, 38 Barb., 535; see S. C. 34 N. Y., 30.

A party will be concluded when in good conscience and honest dealing he ought not to be permitted to gainsay his acts or admissions: *Welland Canal Co. v. Hathaway*, 8 Wend., 488; *Sparrow v. Kingman*, 1 N. Y., 253; *Frost v. Saratoga, etc.*, 5 Denio, 154; *Smith v. Kay*, 7 House Lords Cases, 750.

When the party does an act with intent to influence another or derive an

1875

Carr v. London and North Western Railway Co.

advantage to himself, he is estopped : *Young v. Bushnell*, 8 Bosw., 1 ; *Smith v. Kay*, 7 House Lords Cases, 750.

It must however have been acted and relied upon by the other party : *Sparrow v. Kingman*, 1 N. Y., 253 ; *Farrell v. Higley*, Lalor's Sup., 87 ; *Eldred v. Hazelitt's admr.*, 38 Penn. St. B., 307 ; *Brown v. Bowen*, 30 N. Y., 541 ; *Tucker v. Mallory*, 48 Barb., 91 ; *Banks v. White*, 6 N. Y., 237 ; *Lawrence v. Brown*, 5 N. Y., 394 ; *Jewett v. Miller*, 10 N. Y., 402 ; *Ackley v. Dygert*, 33 Barb., 176 ; *Anderson v. Coburn*, 27 Wisc., 558 ; *Bramble v. The State*, 41 Maryland, 436.

And must have properly had an influence on the conduct of him who asserts the estoppel : *Wright v. Douglass*, 10 Barb., 98, reversed but on another point, 7 N. Y., 564 ; *Otis v. Cusak*, 43 Barb., 546, 550 ; *Lawrence v. Brown*, 5 N. Y., 394 ; *Wiles v. Peck*, 20 N. Y., 47 ; *Hill v. Epley*, 31 Penn. St. Rep., 331 ; *Fox v. Heath*, 16 Abb. Prac., 163 ; *Anderson v. Coburn*, 27 Wisc., 558 ; *Bramble v. State*, 41 Maryland, 436.

So that admissions after the act will not operate as an estoppel : they are but evidence, more or less cogent, according to the circumstances of the case : *Pike v. Acker*, Lalor's Sup., 90, 2 N. Y. Leg. Obs., 408 ; *Eldred v. Hazlett*, 33 Penn. St. R., 307 ; *Lounsbury v. Depew*, 28 Barb., 44 ; *Walrath v. Redfield*, 18 N. Y., 457 ; *Mackay v. Holland*, 4 Metc., 69 ; *Bank v. Bank*, 55 N. Y., 215 ; *Starr v. Yourtee*, 17 Maryland, 341 ; *Corning v. Troy, etc.*, 22 How. Prac., 217.

The party insisting upon the estoppel must be injured or prejudiced by allowing the truth of the admission or statement to be disproved : *Eldred v. Hazlett's adm.*, 33 Penn. St. R., 307 ; *Brown Bowen*, 30 N. Y., 541 ; *Tucker v. Mallory*, 48 Barb., 90.

Where the number of bushels of wheat sold was to be ascertained by weight and the seller delivered to the buyers weigher's certificates ; the buyer acted upon them in paying for the wheat and shipping it to France, drawing bills against the shipments and settling therefor with his correspondent in France ; Held that the seller some two years after was estopped from claiming the weight of the wheat was in excess of what the certificate showed :

Gillespie v. Carpentier, 25 How., 203, 1 Rob., 65, affirmed by Court of Appeals, June, 1868.

Otherwise where the purchaser had lost nothing by the mistake : *Wheaton v. Olds*, 20 Wend., 174 ; *Scott v. Warner*, 2 Lansing, 49, 51.

A party is only concluded against showing the truth, or asserting his legal rights, when that would have the effect of doing a wrong through his means to some third person : *Dezell v. Odell*, 3 Hill, 225 ; *Sparrow v. Kingman*, 1 N. Y., 253 ; *Tucker v. Mallory*, 48 Barb., 90.

Under such circumstances for the prevention of fraud, the law holds the act or admission to be conclusive : *Dezell v. Odell*, 3 Hill, 225 ; *Sparrow v. Kingman*, 1 N. Y., 253.

When a party has not acted with a view to influence another or to derive an advantage to himself and there is no breach of faith in receding, he is not concluded : *Young v. Bushnell*, 8 Bosw., 1 ; *Bank v. White*, 6 N. Y., 237 ; *Mackay v. Holland*, 4 Metc., 69 ; *Jewett v. Miller*, 10 N. Y., 402 ; *Christianson v. Linaford*, 19 Abb. Prac., 221.

The party must ordinarily have intended to mislead : *Jewett v. Miller*, 10 N. Y., 402 ; *Reynolds v. Lounsbury*, 6 Hill, 534 ; *Van Ness v. Bush*, 22 How. Prac., 481 ; *Wiles v. Peck*, 26 N. Y., 47 ; *Hill v. Epley*, 31 Penn. St. Rep., 331 ; *Mackay v. Holland*, 4 Metc., 69 ; *Gillig v. Maas*, 28 N. Y., 192 ; *Zuchlmann v. Roberts*, 109 Mass., 53.

See however *Manufacturers' Bank v. Hazard*, 30 N. Y., 226 ; *O'Donnell v. Kelsey*, 10 N. Y., 412 ; *Sweezey v. Collins*, 40 Iowa, 540.

To constitute such an estoppel, a party must have, designedly, made an admission inconsistent with the defence or claim which he proposes to set up, and another party have with his knowledge and consent, so acted on the admission that he will be injured by allowing the admission to be disproved : *Zuchlmann v. Roberts*, 109 Mass., 54 ; *Hawes v. Marchant*, 1 Curtis's C. C., 136, 144 ; *Audenried v. Betteley*, 5 Allen, 332 ; *Turner v. Coffin*, 12 Allen, 401.

See *Cornish v. Abington*, 4 Hurl. & Norm., 549, commented upon in *Zuchlmann v. Roberts*, 109 Mass., 54.

The party is astopped from denying only what he has once admitted. A

mere notice to him without action on his part cannot be held to operate as an admission: *Despard v. Walbridge*, 15 N. Y., 874.

So mere delay in enforcing one's rights does not operate as an estoppel: *Bidwell v. Astor, etc.*, 16 N. Y., 263; *Covington v. Bowles*, 9 Bush (Ky.), 493-4; *Matter of Empire Assurance Co.*, L. R., 6 Chy. App., 271-2; *Schenck v. Ingraham*, 5 Hun, 397, 406.

One whose name has been forged to commercial paper is not after its negotiation bound to deny his signature, and is not estopped by a failure to do so; his failure to deny the genuineness of the signature is evidence more or less cogent—according to the circumstances of each case—of authority to make the signature. The rule is the same as to one discharged by an alteration of the instrument: *President, etc., v. Crofts*, 2 Allen, 269; *Bank v. Bank*, 55 N. Y., 211, 215-216; *Kilkelly v. Martin*, 34 Wisc., 525; *Starr v. Yurtree*, 17 Md., 341.

But see *Heffner v. Vandolah*, 62 Ill., 482, 14 Am. Rep., 106, and note p. 108; *Kilkelly v. Martin*, 34 Wisc., 525.

It has been held that where the signature was proved to be a forgery, a ratification of the signing of the bond, by the obligor whose signature was forged, does not render him liable thereon, there being no new consideration: *McHugh v. County, etc.*, 67 Penn. St. Rep., 391, 5 Am. Rep., 445, and see note p. 447; see also *Heffner v. Vandolah*, 62 Ill., 483, 14 Am. Rep., 106, and note p. 108.

So payment of one forged instrument does not estop the party making such payment from insisting that a similar bill was a forgery: *Morris v. Bethel*, L. R., 5 C. P., 47.

An estoppel can never arise, founded upon an omission to object to an act or a declaration, when such act is perfectly justifiable, or such declaration perfectly true; as where a landlord sees a tenant improving the real estate leased, for he has a right so to do: *Corning v. Troy, etc.*, 89 Barb., 312, 22 How. Prac., 217, affirmed 40 N. Y., 221; *Ramsden v. Thornton*, L. R., 1 House Lords, 129.

See *Brown v. Bowen*, 30 N. Y., 519; *Ramsden v. Thornton*, L. R., 1 House Lords, 129.

If one's consent to an act be upon

condition, he is not estopped unless the condition be performed: *Brown v. Bowen*, 30 N. Y., 541.

See *Cornell v. Masten*, 35 Barb., 157.

Every estoppel ought to be reciprocal—that is to bind both parties; and this is the reason that regularly a stranger shall neither take advantage of nor be bound by an estoppel: *Lee v. Adair*, 37 N. Y., 95; *Wright v. Douglass*, 10 Barb., 98, reversed but on another point, 7 N. Y., 564; *Cohoes Co. v. Goss*, 13 Barb., 137; *Sparrow v. Kingman*, 1 N. Y., 248; *Walrath v. Redfield*, 18 N. Y., 457; *N. Y., etc., v. Schuyler*, 38 Barb., 535, see S. C. 34 N. Y., 30; *Fox v. Heath*, 16 Abb. Prac., 163; *Carpenter v. Simmons*, 28 How. Prac., 12; *Todd v. Kerr*, 42 Barb., 317.

If the declaration be made to a third person without any intention of influencing the conduct of another, the party making it is not estopped thereby though such other afterwards hear of and act upon it: *Reynolds v. Lounsbury*, 6 Hill, 534; *Bank v. White*, 6 N. Y., 237; *Lawrence v. Brown*, 5 N. Y., 394; *Jewett v. Miller*, 10 N. Y., 402; *Walrath v. Redfield*, 18 N. Y., 457.

An estoppel *in pais* can only be founded upon an assent to, or admission of some fact or the doing of some act. A promise to act is insufficient, and the doctrine cannot be invoked to subvert the principle that prior or contemporaneous agreements are absorbed in a written contract: *White v. Ashton*, 51 N. Y., 280.

Where the facts are known to both parties a promise, without consideration, to waive or not to insist upon a legal right or defence will not operate as an estoppel. As an agreement to waive a right to insist upon the exemption of property from execution: *Crawford v. Lockwood*, 9 How. Prac., 547, S. C. 12 N. Y. Leg. Obs., 105; *Harper v. Leal*, 10 How. Prac., 276; *Kneelle v. Newcomb*, 23 N. Y., 249, affirming 31 Barb., 169; *Springsteen v. Powers*, 3 Rob., 483.

It has been held otherwise in Pennsylvania where at the time of the creation of the debt and in consideration thereof the debtor agreed to waive his right to exemption: *Bowman v. Smiley*, 31 Penn. St. Rep., 235.

So a verbal promise not to plead the statute of limitations as a defence, will

1875

Carr v. London and North Western Railway Co.

not operate as an estoppel: *Shapley v. Abbott*, 42 N.Y., 443; *Andrea v. Redfield*, 12 Blatchford, 408.

See also *Citizens' etc., v. First Bank*, 7 Eng. Rep., 58, 64-5; *Jorden v. Moncy*, 5 House Lords Cases, 185, 213-4.

But see note 1 Hurlstone & Norman, 237, Johnson's Am. ed.; *Davis v. Dyer*, 1 Law and Eq. Reporter, 229, Sup. Ct. New Hampshire.

But where before the statute of limitations had run against a note the holder was about to commence a suit upon it, and the maker promised the holder that if he would suspend bringing a suit upon the note he would abide by the decision of a suit pending upon a similar note, and the holder in consequence of such offer delayed bringing an action upon the second note until after the decision of the action upon the first, and when the statute of limitations had attached to the former: Held that upon the doctrine of equitable estoppel, or estoppel *in pais*, the defendant ought not to be allowed to set up the statute as a defence: *Brookman v. Metcalf*, 4 Rob., 568, 34 How. Prac., 429.

A party is estopped by a judgment where he has agreed another suit shall abide the event thereof, though the judgment is one of nonsuit: *Brown v. Sprague*, 5 Denio, 545.

But when the insured after borrowing of the insurer upon a life policy as collateral, depositing the same with the insurer, had assigned his interest in the policy, the assignee went to the office of the company to ascertain when the premium would become due and an agent of the company promised to notify him and he relying thereon, the time to pay the premium passed; held the company was estopped from forfeiting the policy without notice to the assignee and a reasonable time to pay the premium: *Leslie v. Knickerbocker Life Ins. Co.*, 5 N. Y. Superior Court Rep., 193, S. C., 2 Hun., 616, affirmed by Court of Appeals, Oct. 5, 1875.

See also *Ripley v. Aetna Ins. Co.*, 30 N. Y., 164; May on Insurance, 433-6; *Sommerset, etc., v. May*, 2 Weekly Notes Cases, 43; *Bodine v. Exchange, etc.*, 51 N. Y. R., 117; *Pratt v. New York, etc.*, 55 N. Y., 505; *Sheldon v. Atlantic, etc.*, 26 N. Y., 460; *Trustees, etc., v. Brooklyn Ins. Co.*, 19 N. Y.,

805; *Isaacs v. Royal, etc.*, L. R., 5 Excheq., 296.

A party may when he ought in justice under the circumstances be estopped from setting up the statute of frauds as a defence, be estopped from doing so: *Carpenter v. Otley*, 2 Lansing, 451.

Where the parties to an arbitration had stipulated for an award in writing, it was held that a waiver by one of a written award would not estop him from setting up the invalidity of an oral award: *French v. New*, 28 N. Y., 147.

One who is present, when another is in good faith purchasing or improving property, and knows of such purchase or improvements is estopped from afterwards claiming title to the property: *Brown v. Bowen*, 30 N. Y., 519; *Lounsbury v. Depew*, 28 Barb., 47; 1 Story's Eq. Jur., § 385; *Kanawha v. Kanawha*, 7 Blatchf., 421; *Wood v. Seeley*, 32 N. Y., 105; *Ramsden v. Thornton*, L. R., 1 H. L., 129; *Bullis v. Noble*, 36 Iowa, 618.

But, see *Requa v. Holmes* 26 N. Y., 338; *Christianson v. Sinafard*, 3 Robertson, 215.

The plea that he had forgotten that his deed or title carried the lot in controversy will not avail to prevent the estoppel: *Bullis v. Noble*, 36 Iowa, 618.

Or from setting up a lien thereon: *Ingalls v. Morgan*, 10 N. Y., 178.

Even though the lien be a matter of record: *Markham v. O'Connor*, 52 Georgia, 183.

So from setting up a set off or defence to a claim purchased: *Foster v. Newland*, 21 Wend., 94; *Tyler v. Yates*, 3 Barb., 222; *L'Amoureux v. Visser*, 2 N. Y., 278; *Hubbard v. Briggs*, 31 N. Y., 533; *Rider v. Union, etc.*, 4 Bosw., 169.

So the lessee of a farm who fixes a boundary line between himself and his neighbor, is so far estopped from showing that such line was erroneously settled, that he cannot maintain trespass against his neighbor for taking and carrying away crops put in by him upon the assumption that the line agreed upon between them was the true line: *Dewey v. Bordicell*, 9 Wendell, 65.

So one who encourages an improvement is estopped from subsequently

claiming it as a nuisance: *Williams v. Earl, etc.*, 1 Craig & Phillips Ch., 91; *Smith v. Kay*, 7 House Lords Cases 750. But see *Nash v. Kemp*, 49 How. Prac., 522.

But a mere license, after revocation, will not estop the party: *Eggleston v. New York, etc.*, 35 Barb., 162; *Babcock v. Utter*, 1 Abb. Court App. Dec., 27.

Otherwise if a party assist in making an improvement on the theory that it is properly made: *Brown v. Bowen*, 30 N. Y., 519.

Where the owner of a defined way stood by and saw the purchaser of the servient estate erect a wall across the way, so as effectually to stop it, and made no objection, it was held to work an estoppel to any claim of right to remove the building for the purpose of opening the way: *Arnold v. Cornman*, 50 Penn. St. R., 361.

So where one advised another that there was sufficient fall in a stream to justify the erection of a dam, that he had measured it, and such other relying upon such assertion proceeds to erect the dam at considerable expense: *Wilson v. Vaughn*, 40 Iowa, 179.

See *Ramsden v. Thornton*, L. R., 1 House Lords, 129; *Nash v. Kemp*, 49 How. Prac., 522.

One who has received a legacy under a will cannot be permitted to contest the validity of the will, without repaying the amount of the legacy, or bringing the money into court: *Holt v. Rice*, 54 N. H., 398.

A party is not estopped from denying that an officer had power to sell his property under an execution, unless it appear that with knowledge of the facts he misled the purchaser: *Carpenter v. Stilwell*, 11 N. Y., 61; *Harris v. Murray*, 28 N. Y., 574.

Where the purchaser knows the facts he cannot be misled by the owner's silence: *Harris v. Murray*, 28 N. Y., 574.

A second mortgagee of personal property by consenting to a sale thereof by the mortgagor discharged of his mortgage, does not warrant the purchaser's title, or estop himself to set up against him a title under a subsequent assignment of the first mortgage: *Clark v. Hale*, 8 Gray, 187; *Gillig v. Maas*, 28 N. Y., 192.

See also *Wheeler v. Ruckman*, 5 Rob.,

702; 2 Abb., N. S., 186; 35 How. Prac., 350; 51 N. Y., 391.

The owner of land who might, by virtue of a superior equity, have restrained a sheriff's sale thereof is estopped, as against a purchaser under sheriff's sale, from setting up his title as against a bona fide purchaser where the effect would be to throw upon the latter the loss of the purchase money; so where the purchaser had been induced by the purchase to release a lien upon other lands: *Frost v. Quackenbush*, 18 Abb. Prac., 3.

But, where one knowing what he is doing encroaches by building upon his neighbor's land, such neighbor is not estopped from setting up his title by mere silence or acquiescence, nor is he bound to give notice to the wrongdoer to desist: *Christianson v. Sinafard*, 19 Abb. Prac., 221; *Ramsden v. Thornton*, L. R., 1 House Lords, 129.

Otherwise if the stranger be acting in good faith and the owner knowing such fact permit him to proceed: *Ramsden v. Thornton*, L. R., 1 House Lords, 129.

A married woman is not estopped from setting up a prior mortgage by executing with her husband a deed of the premises for the purpose of releasing her dower in the premises: *Power v. Lester*, 28 N. Y., 534; *Gillig v. Maas*, 28 N. Y., 192.

See *Bernetto v. Holden*, 21 Grant, U. C. Chy., 222.

A married woman is not estopped from insisting that a contract which she was incapable of making is invalid: *Merriam v. Boston, etc.*, 117 Mass., 241, 244; 11 C. B., N. S., 269, Johns. Am. ed., note.

See *Bernetto v. Holden*, 21 Grant, U. C. Chy., 222.

Otherwise as to a contract she has capacity to make or a transaction in which she may legally engage: *Bodine v. Killern*, 53 N. Y., 93, 96; *Coster v. Isaac*, 1 Robertson, 176.

And where her husband has not for years resided in the state, she trading as a feme sole: *Shields v. Belman*, 1 Tenn. Chy. (Cooper), 589.

In a suit against a husband by one who had taken an acceptance in consequence of a statement of the wife that it was genuine, the court was equally divided as to whether the husband was

1875

Carr v. London and North Western Railway Co.

liable: *Wright v. Leonord*, 11 C. B., N. S., 258, and note p. 269, Johnson's Am. ed.

When the facts are known to both parties an admission or declaration as to the law will not operate as an estoppel; for even a lawyer may increase his knowledge as to his legal rights, without forfeiting his estate on account of his former ignorance: *Chataqua, etc.*, v. *White*, 6 N. Y., 252-3; *Brewster v. Striker*, 2 N. Y., 19.

There is no estoppel by or from a record where the facts which show it ought not to so operate appear upon the face of the record: *Manby v. Scott*, O. Bridgman, 231; *Chedington's Case*, 1 Coke, 155.

So where the truth is known to both parties, or if they have equal means of knowledge, there can be no estoppel by the silence of one of them: *Hill v. Epley*, 31 Penn. St. R., 331; *Mackay v. Holland*, 4 Metc., 69; *Harris v. Murray*, 28 N. Y., 574; *Nash v. Kemp*, 49 How. Pr., 523.

A party will not be estopped unless he knew the facts which required him to act or refrain from acting: *Gillig v. Maas*, 28 N. Y., 192.

Unless his ignorance was the result of gross carelessness: *Swezey v. Collins*, 40 Iowa, 540.

Where the wife of the true owner of land acted as agent for another person in negotiating a sale from the latter to defendant, without notifying defendant that she or her husband claimed any interest in the land, but it did not appear that she then knew of her rights nor that defendant relied upon her representations: Held, that she was not estopped from setting up her claim after her husband's death: *Anderson v. Coburn*, 27 Wisconsin, 558.

A director of a bank is not estopped, as against the cashier from whom he purchased stock, from denying knowledge of the true condition of the bank: *Lefever v. Lefever*, 30 N. Y., 27.

One who subscribes an instrument as a witness without knowledge of its contents, or the transaction consummated thereby, is not estopped by such instrument or his witnessing the execution thereof: *Hale v. Skinner*, 117 Mass., 474.

See *Firebrace v. Moore*, Colles., 138.

Nor is a subscribing witness, *per se*,

chargeable with notice of the contents of the instrument, though it may be shown he had in fact such notice: *Welford v. Beezeley*, 1 Ves. Sen., 7, 3 Atk., 501, 503.

Where a party by his declarations and conduct invites an action against himself, and induces the bringing thereof upon the theory of such declarations and inducement, he is estopped from insisting to the contrary: *Abel v. Van Gelder*, 36 N. Y., 514; *Finnegan v. Carraher*, 47 N. Y., 493; *Horne v. Cole*, 51 New Hampshire, 287; *Ford v. Williams*, 24 N. Y., 359; *Walrath v. Redfield*, 18 N. Y., 457; *Trustees v. Williams*, 9 Wend., 147; *Carter v. Hammett*, 12 Barb., 253.

In Massachusetts, however, it has been held that a defendant in an action of trover, who has induced the plaintiff to believe when demanding the property, that it was in his possession and control, is not thereby estopped in law from proving the contrary: *Jackson v. Pixley*, 9 Cush., 490.

A lessor leased premises for six months, payable monthly in advance, with agreement to make certain alterations. Before the first month expired or the alterations were made, the lessee turned over her lease, for the month paid in advance, to defendant. The lessor declining to complete the repairs unless assured of the payment of the balance of the rent, the defendant told him the lease had been assigned to him, and he would pay the rent. The lessor completed the repairs; and at his request defendant stipulated in writing to the effect that the lessee having assigned her interest in the lease to him, he agreed to comply with its terms. Soon after the commencement of the second month he surrendered the possession of the premises on the demand of the original lessee, but without any notice to the lessor. The latter sued for the rent of the second month: Held, that this was not a case of novation. To have made it such the defendant must have been liable to the lessee for the rent sued for; and in consideration therefor, and by her order or consent, and in discharge of her obligation, must have promised to pay the same to the lessor. Held further, that if the plaintiff was induced to incur the expense of the litigation in reliance upon

a promise by defendant to pay, which was apparently legal and valid, and upon a statement of the defendant establishing his liability, which, though not true, plaintiff had reason to believe it so and to rely upon, defendant is estopped to deny the truth thereof. Expenditure in litigation may as reasonably constitute the basis of an estoppel as any other expenditures: *Meister v. Birney*, 24 Mich., 435.

If the maker of a note interposes the defense of usury in a suit upon a former note which was in part the consideration therefor, he is estopped by his answer in the suit upon the subsequent note from insisting such note was not in fact usurious: *Sheppard v. Hamilton*, 29 Barb., 156.

See *Wheeler v. Ruckman*, 2 Abb. N. S., 186, affirmed 51 N. Y., 391.

Where a party upon a motion to strike out his answer as sham, objected that the plaintiff's attorney had returned the answer to him; and therefore it was not an answer in the case, he cannot afterwards insist that a judgment upon default was irregular, because the answer was valid until disposed of by order of the court, or by trial: *Huffnug v. Groce*, 18 Abb. Prac., 14, affirmed 42 Barb., 548.

An officer of a private corporation having executed in behalf of the corporation a note for the price of property sold to it by a stranger, is estopped in a suit brought to charge him as a stockholder with the payment of such note, from alleging a want of power in the corporation to make the purchase: *Moss v. Averill*, 10 N. Y., 449.

So, it seems, that the indorser of a bill or note is estopped, as to subsequent parties, from denying the genuineness of the signature of the drawer, acceptor, or prior indorsers, and their capacity to act as such, although the indorsement was made for the accommodation of a prior party, and the paper is transferred to such prior party to one having notice of the facts: *Troy City Bank v. Lanman*, 19 N. Y., 477.

So the acceptor of a bill is estopped from denying that the drawer's signature was not his true name: *Clafin v. Griffin*, 3 Bosw., 689.

So one who contracts with executors is estopped from denying they are such, and from denying the right of the ex-

ecutors to sue upon the covenant in their representative capacity: *Farnham v. Mallory*, 2 Abb. Court App., Dec., 100, 3 Trans. App., 171.

A mortgagor to a corporation entered into a written contract with the company for the surrender of shares of its stock in part satisfaction of the mortgage, provided certain creditors of the company, for whose security the mortgage had been assigned to trustees, should consent: Held, that having thus recognized the title of the trustees, the mortgagor was estopped from denying the validity of the assignment to them, and insisting that the stock should be applied in satisfaction of the mortgage without the assent of the trustees or creditors interested in the trust: *Palmer v. Smith*, 10 N. Y., 308.

The maker of a note who certifies it is given for value and will be paid when due, is estopped from setting up the defence of usury as against one who, without knowledge of usury or facts to put him on inquiry, purchased the note on the faith of the certificate, at a discount greater than legal interest: *Chamberlain v. Townsend*, 7 Abb. Prac., 31, 26 Barb., 611; *Mechanics' Bank v. Townsend*, 17 How. Prac., 569; *Mason v. Anthony*, 3 Transcript Appeals, 255, 3 Abb. Court App. Dec., 207; *Ferguson v. Hamilton*, 35 Barb., 427; *Real Estate, etc., v. Seagrave*, 49 How. Prac., 489.

See *Lesley v. Johnson*, 41 Barb., 359; *Hills v. Varet*, 3 N. Y. Leg. Obs., 105; *Griggs v. How*, 31 Barb., 100, 3 Keyes, 166, 2 Abb. Court Appeals Dec., 291.

But such estoppel must arise *aliunde* the note. The acknowledgment therein of "value received" is not sufficient; nor, as against an accommodation indorser, will a simple indorsement estop him: *Clark v. Sisson*, 31 N. Y., 312.

A party usuriously transferring an instrument will be estopped by a representation that it is business paper: *Ferguson v. Hamilton*, 35 Barb., 427.

But an accommodation indorser will not be estopped by such a representation by the drawer of a bill: *Jackson v. Fassitt*, 21 How. Prac., 279.

Where the purchaser has knowledge of the usury, of facts to put him on inquiry, the party is not estopped by a certificate of "no defence" given when the loan is made or security is trans-

1875

Carr v. London and North Western Railway Co.

ferred: *Duquesne Bank Appeal*, 74 Penn. St. Rep., 426.

The holder of negotiable promissory notes purchased before maturity, and for value, but with notice that they had been obtained from the maker by fraud and without consideration, cannot, by way of estoppel, prevent the maker from setting up such defences as against him, by showing that the maker, before the purchase, had informed him that the notes were all right, and would be paid at maturity, if it appear that at the time such declarations were made, the maker was ignorant of such fraud and want of consideration, and that the holder at the time believed him to be ignorant thereof, unless he also show that he informed the maker of the facts, which had previously come to his knowledge, affecting the validity of the notes: *Sackett v. Kellar*, 22 Ohio St. Rep., 554.

But if such certificate or even an affidavit that there is no usury be exacted by the lender as expedients or contrivances to cover the vice of usury, the truth may be shown: *Real Estate, etc.*, v. *Seagrave*, 49 How. Prac., 489.

When the indorser of a bill, after the receipt of notice of protest, on going to take up the bill, was informed by the holder that it had been paid, and, by such information the indorser was prevented from collecting it of the drawer, who subsequent became insolvent (the acceptor being insolvent at the time), held that the indorser was discharged from liability, although such information proved to be erroneous, and was honestly given. He was held to be estopped upon the ground that it would be a fraud to show that it was untrue to the prejudice of one who had acted upon the faith of the statement: *Kingsley v. Vernon*, 4 Sandf., 361; see also note 11 Eng. Rep., 44-5.

When one accepts the damages awarded to him on the taking of land for a public street, he is estopped thereby from alleging that the title to such premises did not become vested in the corporation: *Sherman v. McKeon*, 8 Bosw., 103, 38 N. Y., 266; see also *Neff v. Bates*, 25 Ohio St. Rep., 169.

See, however, *Requa v. Holmes*, 26 N. Y., 338, S. C., 16 N. Y., 193.

So a widow who accepts a part of the purchase price of land sold by

executors, in lieu of dower, is estopped from claiming dower in such lands: *Wood v. Seeley*, 32 N. Y., 105.

It has been held that an infant will be estopped when his guardian, under the sanction of the court, has contracted to sell the infant's lands and the purchaser has paid for the premises and made improvements thereon, even though such contract of sale were by parol: *Wood v. Mather*, 38 Barb., 473; *Price v. Winter*, 15 Florida, 66.

See *Bennetto v. Holden*, 21 Grant, U. C. Chy., 222.

Particularly if the infant, after arriving at age, receive or retain the purchase money or a part thereof: *Henry v. Root*, 33 N. Y., 526; *Walker v. Mulvean*, 76 Illinois, 19; *Corwin v. Shouf*, 76 Illinois, 246.

See, however, *Walsh v. Powers*, 48 N. Y., 23; *Irvine v. Irvine*, 9 Wallace, 618; *Carroll v. Potter*, 23 Mich., 377; *Prout v. Wiley*, 28 Mich., 164; *Ackley v. Dygert*, 31 Barb., 176; *Requa v. Holmes*, 26 N. Y., 338; *Id.*, 16 N. Y., 193; *Wood v. Seeley*, 32 N. Y., 105; *Ryder v. Flanders*, 30 Mich., 336.

An adult co-tenant who joins in a petition praying a court of equity to order a sale of the land held by the adult and infant in co-tenancy is bound by the order made pursuant to his request: *Wood v. Mather*, 38 Barb., 473.

The fact that a party receives the surplus of the avails of his property sold under an execution illegally issued will not deprive him of his right of action for unlawfully suing out the process: *Brown v. Fecter*, 7 Wend., 303.

Quere, Would he be as against the purchaser? *Wood v. Jackson*, 8 Wend., 9; *Requa v. Holmes*, 26 N. Y., 338, 16 N. Y., 193.

If one of two parties, each having a written title to a tract of land, purchase a supposed better title, under an agreement to divide the premises, the other is estopped from denying the right of the one who so purchased, on the faith of the contract, to a moiety of the land: *Ruff v. Orr*, 31 Penn. St. Rep., 517.

Where goods seized by a constable upon an execution were delivered to a third person on his giving a receipt promising to deliver them by a given day, and when the day arrived the re-

ceptor refused to comply with his promise, claiming that the goods at the time of the levy and receipt were his own: Held, in trover by the officer, that the receptor was estopped from setting up title in himself: *Dezell v. Odell*, 3 Hill, 215.

See *People v. Reeder*, 25 N. Y., 302; *Spear v. Hill*, 54 N. H., 87; *Stimson v. Ward*, 47 Vermont, 624.

But had the receptor complied with his agreement and delivered the goods to the officer he would not have been estopped from maintaining trespass against the officer for selling: *Russell v. Winne*, 37 N. Y., 591, 593.

The obligors to a bond for the release of property attached are not estopped from showing the attachment was issued without jurisdiction: *Cudwell v. Colgate*, 7 Barb., 253.

Where an insurance company with knowledge that a warranty in an application for a policy was false, assessed the insured on his note, and he paid the assessment: held, the company was estopped from insisting the policy was void on account of the falsity of the warranty: *Frost v. Saratoga, etc.*, 5 Denio, 154.

Where the assured signed the application for a policy prepared by the agent of insurer on the agent's representation that he had authority to make the surveys and measurements, held, that assuming the representations to be true the insurer was estopped from showing a breach of warranty by proof of errors material to the risk in the survey and application: *Plumb v. Cattaraugus, etc.*, 18 N. Y., 392; *Rowley v. Empire Ins. Co.*, 36 N. Y., 550.

See *Chase v. Hamilton, etc.*, 20 N. Y., 52, reversing 22 Barb., 527.

An insurance company having accepted an abandonment of the vessel insured as a total loss, is concluded thereby from objecting that the loss was not total, or that from any other reason it was not a case for abandonment: *Buffalo, etc., v. North Western, etc.*, 30 N. Y., 251.

An agent who receives money for his principal is estopped as between himself and his principal from denying the right of the latter thereto: *Murray v. Vanderbilt*, 39 Barb., 141.

So a mere carrier or messenger from setting up that the contract on which

the money was sent by him for his principal was illegal: *Merritt v. Milard*, 10 Bosw., 306, 3 Abb. Court Appeals Dec., 291.

See *Bigelow v. Davis*, 16 Barb., 561; *Hoffman v. Schwabe*, 33 Barb., 194.

So one who sells as agent for A. is estopped as against the purchaser who pays A. for the property from denying that he was the agent of the latter: *Rogers v. Hadley*, 2 Hurl. & Coltman, 227.

A husband who by deed of separation conveys real estate to trustees for the benefit of his wife, is estopped on her death from claiming a life estate in the lands so conveyed to her: *Wallace v. Bassett*, 41 Barb., 92.

A grantor who covenants for quiet enjoyment by the grantee of the lands conveyed is estopped from setting up title thereto: *Long Island R. R. v. Conklin*, 29 N. Y., 572.

The plaintiff who orders process in a case where the court, being one of limited jurisdiction as to residence of the parties, and proceeds to judgment, is estopped from denying jurisdiction on account of residence of the parties: *Fairbanks v. Cortis*, 8 E. D. Smith, 582, 1 Abb. Prac., 150.

A party who procures a void divorce is not estopped from insisting upon its illegality: *Todd v. Kerr*, 42 Barb., 317.

Where when a constable, by virtue of an execution, levied upon property, he was informed by the debtor he had sold the goods to a third person, but the constable nevertheless took and sold the goods: held in trespass by the debtor he was not estopped from showing the goods belonged to him: *Farrrell v. Higley*, Lalor's Sup., 87.

Otherwise had the constable, in consequence of such declarations, levied upon the goods by virtue of an execution against such third person: *Horne v. Cole*, 51 New Hampshire, 287; *Rigney v. Smith*, 39 Barb., 383.

A statement by the owner of real property, to another person who applied for leave to enter thereon and remove certain fixtures furnished by him, for which he had not been paid, that he himself had no objection, but could not give his express consent for fear of trouble with the mortgagees, was not a license to remove them. Nor was he thereby estopped from suing him for

1875

Carr v. London and North Western Railway Co.

such removal: *Sparks v. Leavy*, 1 Rob., 530.

The plaintiff, who had sold a chattel to a third person on condition that it should remain the plaintiff's until paid for, and had given him a receipted bill of particulars therefor, omitting at his request any statement of the condition, told the defendant in reply to inquiry, that he had sold it to the third person; and the defendant thereupon having seen the bill from the plaintiff, bought the chattel from the third person, who had not paid for it. Held, that, in the absence of fraud, the plaintiff was not estopped from claiming the chattel from the defendant: *Zuchlman v. Roberts*, 109 Mass., 53.

The grantor in a deed is not, as against the grantee, estopped from showing the deed was never delivered by the fact that he had caused it to be recorded unless recorded for the use of the grantee, and accepted by him: *Van Valen v. Schermerhorn*, 22 How. Prac., 416; *Foster v. Beardley*, etc., 47 Barb., 505; *Parmelee v. Simpson*, 5 Wallace, 81; *Elsev v. Metcalf*, 1 Denio, 323; *Kingsbury v. Burnside*, 58 Illinois, 310, 5 Am. Law Times Rep., 17; *Hawkes v. Pike*, 105 Mass., 560; *Adams v. Adams*, 21 Wallace, 185; *Com. v. Jackson*, 10 Bush (Ky.), 424; *Burkholder v. Casad*, 47 Indiana, 418. See *Seldon v. Delaware*, etc., 20 N. Y., 634.

Though proof that he caused a conveyance to be recorded would be *prima facie* evidence of delivery: *Van Valen v. Schermerhorn*, 22 How. Prac., 416; 2 Greenl. Ev., § 297; *Foster v. Beardley*, etc., 47 Barb., 505; *Parmelee v. Simpson*, 5 Wallace, 81; *Rathbun v. Rathbun*, 6 Barb., 98; *Adams v. Adams*, 21 Wallace, 185.

The giving of an undertaking, in replevin, to prevent the delivery of the property, by the sheriff, to the plaintiff, in an action brought to recover the possession, will not operate as an estoppel: *Andrews v. Shattuck*, 32 Barb., 96.

Sureties who sign a collector's bond, reciting that he is such, in a suit upon the bond are estopped from denying that he was such collector: *Fuke v. Whipple*, 39 Barb., 339, 39 N. Y., 394.

And the collector will be estopped from alleging that he acted illegally in collecting taxes, and for that reason

is not officially responsible: *Mississippi County v. Jackson*, 51 Missouri, 23.

But sureties to an undertaking on appeal are not estopped from showing that the appeal was without jurisdiction: *Ward v. Syme*, 8 N. Y. Leg. Obs., 95, affirmed but on another point, 4 N. Y., 171.

See *Bonne v. Mellor*, 6 Hill, 496.

Where a party sold land at a given price per acre "to be measured within ten days," he is not estopped by a failure to measure it within that time from insisting there are a greater number of acres than stated in the deed, though it gave the number "be the same more or less." *Clute v. Jones*, 28 N. Y., 280; *Witbeck v. Waine*, 16 N. Y., 532.

If after a release the debtor present a petition for discharge as an insolvent verifying the indebtedness, he is not estopped thereby from setting up the release: *Maybee v. Sniffen*, 15 N. Y., 560, affirming 2 E. D. Smith, 1.

Payment to a father of a portion of the wages of a son does not estop the party making the same from showing a general emancipation of the son by the father: *McIntyre v. Fuller*, 2 Allen, 345.

A common carrier is not estopped, as against the parties to the instrument, by an admission in a bill of lading that the goods are received "in good order," from showing by parol evidence that the goods were not in good order when received: *Ellis v. Willard*, 9 N. Y., 529; *Meyer v. Peck*, 28 N. Y., 590, 596.

Claiming in one action to be the owner of a chose in action by virtue of a specified transfer does not preclude the plaintiff from claiming in a subsequent action, for the same cause that he became the owner by a prior and different transfer: *Wheeler v. Ruckman*, 5 Rob., 702, 2 Abb., N. S., 186, 35 How. Pr., 350, affirmed 51 N. Y., 391; *Sheridan v. Andrews*, 49 N. Y., 478.

A second mortgagee may litigate the amount due on the first mortgage notwithstanding a judgment or award between the mortgagor and mortgagee determining the amount due thereon: *Campbell v. Hall*, 16 N. Y., 575.

Though a judgment in partition bars a future contingent interest though persons taking the same are not *in esse*:

Mead v. Mitchell, 17 N. Y., 210; *Clemens v. Clemens*, 37 N. Y., 70; *Bowman v. Tallman*, 27 How. Prac., 271.

See *Wood v. Mather*, 38 Barb., 474; *Gray v. Barnard*, 1 Tenn. Chy., 298.

Where a mortgage or title is taken pending the action in which such judgment is rendered the purchaser is bound by the judgment: *Bennett v. Couchman*, 48 Barb., 78, 83.

One who purchases, at a sheriff's sale, the interest of a defendant in an execution is not estopped from denying the right of such defendant to execute a prior chattel mortgage upon the property so purchased by him: *Carpenter v. Simmons*, 28 How. Prac., 12.

The grantee of one entitled to avail himself of an estoppel may also take advantage thereof: *Dunkel v. Wiles*, 5 Denio, 297, 6 Barb., 515, 11 N. Y., 420.

So an indorsee of a note may avail himself of an estoppel which would have been valid in favor of his indorser: *Moss v. Averill*, 10 N. Y., 449.

So an execution creditor in an action against the sheriff may avail himself of an estoppel in favor of the sheriff against the receptor for property levied upon: *People v. Reeder*, 25 N. Y., 802.

It is however only available by parties or privies: *Fox v. Heath*, 16 Abb. Prac., 163.

One who accepts a conveyance of real estate subject to the payment of a mortgage for a certain sum is not estopped from setting up that so large an amount was not due thereon: *Hartley v. Latham*, 26 How. Prac., 158, 10 Bosw., 274, 24 How., 505.

In ejectment for dower against a grantee of the husband, or a person holding under such grantee, the defendant is not estopped from showing that the husband was not seized of such an estate in the premises as to entitle the widow to dower: *Sparrow v. Kingman*, 1 N. Y., 242, overruling *Sherwood v. Vandenburg*, 2 Hill, 303, and *Bowne v. Potter*, 17 Wend., 164; *Poster v. Dwinel*, 49 Maine, 44, 1 Am. Law Reg., N. S., 604.

The rule is the same though the deed from the husband were one with full covenants: *Finn v. Sleight*, 8 Barb., 401.

So one who on the death of an ancestor will become entitled to land is not estopped by a deed of such ancestor: *Moore v. Littell*, 40 Barb., 488.

Public officers are not estopped from setting up a want of jurisdiction although they have acted upon the theory that they had jurisdiction. *People v. Comr's* 27 Barb., 94, 80 N. Y., 470.

Though an officer of the court is ordinarily estopped upon the same principles as an individual: *Wheeler v. Ruckman*, 2 Abb., N. S., 186, affirmed 51 N. Y., 891.

In New York if land be granted to A. and after his death to his heirs and their assigns forever, the persons who at the termination of the life estate are the heirs of the tenant for life take as purchasers and not by descent. The child of an heir apparent whose mother dies before her ancestor, will not be estopped by covenants in his mother's deed: *Moore v. Littell*, 40 Barb., 488; see also *Jackson v. Middleton*, 52 Barb., 9, and *Woodgate v. Fleet*, 44 N. Y., 1, and note, p. 21.

Though a tenant is estopped from denying the title of his landlord or from setting up an adverse possession against him: *Corning v. Troy, etc.*, 22 How., 217.

A mortgagee not as his tenant or to pay rent but to keep the fences in repair, pay the taxes and enjoy the rents and profits not recognizing an absolute title in the mortgagor is not estopped from controverting the mortgagee's title but may show the real facts of the case: *Sahler v. Signer*, 37 Barb., 629.

But a lessee who by virtue of the letting remains in possession during the term, and who is not disturbed in any manner therein, is estopped from denying the lessor's title although he did not obtain possession originally from such lessor. In order to claim the benefit of this estoppel, in a suit for rent, it is not necessary to allege in the complaint that the lessee occupied under the lease. It is sufficient to set out the lease, and if the lessee answers denying the title, it is conclusively established by showing use and occupation: *Prevot v. Lawrence*, 51 N. Y., 219.

The admissions of one of two joint contractors (where they are not partners) cannot deprive the other of his defence, when both are sued upon the contract: *Lewis v. Woodworth*, 2 N. Y., 512.

As to the amount of evidence required to establish an estoppel, see *Brown v. Bowen*, 80 N. Y., 519.

1875

Alletson v. Chichester.

[Law Reports, 10 Common Pleas, 819.]

Jan. 21, 1875.

ALLETSON and Another v. CHICHESTER and Others ;
WAKE and Another, Claimants.

Bankruptcy—Life Policy in the Order and Disposition of the Bankrupt—Notice of Assignment to the Office.

In 1845 R. effected a policy for £1,000 upon his life, and assigned it by way of mortgage to G. In 1858, W. (who was G.'s attorney) went to the office to pay a premium and to confer with the secretary upon other business connected with the office, and then informed him of the assignment. In 1862 R. became a bankrupt, and he died in 1871. After the death of R. the office for the first time had notice of his bankruptcy:

Held,—upon a special case, the court to draw inferences of fact,—that the conversation between W. and the secretary in 1858 was a sufficient notice to the office that the policy had been assigned and was not in the order and disposition of R.; the statute requiring such notices to be in writing not being at that time in existence.

THE plaintiffs sued the defendants as directors of the Legal and General Life Assurance Society (being the persons liable to be sued) upon a policy of insurance bearing date the 28th of August, 1845, and numbered 2,644, effected with the society upon the life of one Samuel Russell, deceased. The plaintiffs sued, under the provisions of the statute to enable assignees of policies of life-assurance to sue on them in their own names, as executors of Joseph Boaler, deceased.

The claimants are W. Wake and T. W. Rodgers, registrars of the county court of Yorkshire holden at Sheffield, as trustees of *the estate of Russell under the bankruptcy law. Upon interpleader proceedings taken by the defendants, an order was made by Hannen, J., that the defendants should pay into court £1,322 to abide the decision of a special case to be stated between the parties.

1. By a policy of insurance, No. 2,644, dated the 23d of August, 1845, effected with the Legal and General Life Assurance Society, under the hands of three of the directors of the society, a sum of £1,000 was assured to be paid to the executors, administrators or assigns of Samuel Russell within three calendar months after proof of the death of Russell, together with such further sum or sums as should be added to the sum assured as a bonus under the provisions of the deed of settlement of the society, unless an equivalent for such further sum or sums should have been paid or allowed to the party or parties entitled thereto.

The annual premium payable to the society during the continuance of the insurance was £26. The circumstances under which the policy was effected were as follows :

2. In the year 1845, Samuel Russell and Sarah his wife applied to Mr. John Whall, an attorney and solicitor carrying on business at Worksop, to raise for him a loan of £500. Sarah Russell was at that time entitled for life to the rents of certain freehold and leasehold hereditaments and premises situate at Sheffield : and Samuel Russell was entitled to an estate for life in remainder in the same hereditaments expectant on the decease of his wife.

3. Whall was at that time the attorney and solicitor of Edward Girdler of Netherthorpe ; and Whall applied to him for the loan so required by the Russells, and Girdler agreed to lend the amount upon condition that the repayment with interest at £5 per cent. per annum should be secured to him by a conveyance and assignment by the Russells of their respective interests in the hereditaments and premises at Sheffield, and by the assignment of a policy of assurance to be effected upon the life of Samuel Russell in the sum of £1,000 at the least.

4. Russell thereupon applied to the Legal and General Assurance Society to insure his life ; and on the 22d of August, 1845, he brought to Whall a letter of approval by the society of a proposal made by him to the society, for an insurance on his life *for £1,000. On the same day, at [321 the request of Russell, Whall sent by post to Edmunds, the then actuary of the society, a banker's draft for £29, being the amount of the first annual premium and stamps, payable in respect of such insurance, accompanied by a letter as follows :

“ Worksop, 22d August, 1845.

“ Dear Sir,—Inclosed herewith I send you, at the request of Mr. S. Russell, his declaration and proposal for an assurance for £1,000 upon his own life. I also send you a banker's draft for £29, the amount of the first annual premium and stamp. The policy must be sent to me when completed, and notice of renewal must also be sent to me annually in the usual course. I understand from Mr. Russell that he signed a declaration when in town. Will you allow me to inquire whether both declarations are to be the basis of this contract with the society ? I am not aware whether they are the same or different forms. You will observe I have not made any deduction in this remittance for the usual allowance of commission to solicitors ; but I presume a commission will be allowed to me by the office. Will

1875

Alletson v. Chichester.

you be good enough to inform me whether you have any shares to dispose of, and also send me a prospectus.

(Signed) "John Whall.

"P.S.—Your letter of approval is dated the 5th instant, and No. 3,403,"

5. By deed dated the 25th of August, 1845, Samuel Russell and Sarah his wife conveyed and assigned the policy and the money thereby secured, and their several and respective interests in the hereditaments and premises at Sheffield, to Girdler, his executors, administrators, and assigns, for the purpose of securing the repayment of the sum of £500, which was then advanced by him to Russell, with interest at the rate of 5 per cent. per annum.

6. On the 3d of September, 1845, Whall received by post from the Legal and General Assurance Society the policy of assurance, and retained it on behalf of Girdler, and continued to retain it until the date of the transfer of the security of the 25th of August, 1845, hereinafter referred to.

7. Whall acted as attorney and solicitor for Girdler and 322] for *Russell in all matters and transactions relating to the said loan.

8. Russell, by indenture bearing date the 30th of March, 1853, and made between himself of the one part and W. Radley of the other part, in consideration of £600 then due and owing from Russell to Radley, assigned the said policy of assurance and the money thereby assured (subject to the security of the 25th of August, 1845), as a security for the payment to Radley of £600 and interest at 5 per cent. per annum.

9. Whall acted as the attorney and solicitor of Russell and also of Radley in the matter relating to the indenture of the 30th of March, 1853; and Whall was also at that time acting as the attorney and solicitor of Girdler.

10. The indenture of the 30th of March, 1853, and the principal money and interest thereby intended to be secured were, by an indenture dated the 14th of April, 1864, made between Radley of the first part, Russell of the second part, and Elizabeth Fowe of the third part, duly assigned to Elizabeth Fowe; and there is now due and owing to her £1,100 and upwards. Whall does not now act as the attorney or solicitor of Elizabeth Fowe.

11. The Russells had, previously to the execution of the indenture of the 30th of March, 1853, viz., in 1848, borrowed of Radley certain sums of money on security of their interests in the hereditaments and premises at Sheffield, and of

certain policies of assurance which are not the subject of this action.

12. In the year 1850, Girdler (the interest due on his security of the 25th of August, 1845, being then in arrear), instructed Whall on his behalf to enter into the receipt of the rents and profits of the hereditaments and premises at Sheffield. Whall was also subsequently instructed by Radley to enter into receipt of the same rents and profits. Whall entered into the receipt of the said rents and profits accordingly, and continued to receive the same until the death of Russell in August, 1871. The said rents and profits were applied by Whall, first, in payment of the premiums from time to time payable in respect of the policy which forms the subject of this action, and in payment to Girdler and his transferees hereinafter mentioned of the interest due in respect of the security of the 25th of August, 1845, and in the next place in *payment of the premiums of other [323 policies of insurance and interest upon other incumbrances with which the said rents and profits were charged by the Russells.

13. On the 25th of August, 1858, Whall wrote to Mr. Nettleton, the secretary or actuary for the time being of the Legal and General Assurance Society, as follows :

“Worksop, 25th August, 1858.

“Dear Sir,—Our clients, the Worksop Local Board of Health, have occasion to raise under the powers of an act of Parliament £6,000, repayable in thirty annual instalments, with interest. May we ask whether your directors will lend the board this sum, and at what rate of interest? . . . I shall have occasion to call upon you on Friday next, the 27th inst., with the premium payable on policy No. 2,644, and will take that opportunity of conferring with you on the subject of the loan.

(Signed) “John Whall.”

14. On the 27th of August, 1858, Whall, who was still acting as the attorney and solicitor of Girdler, went to the office of the Legal and General Life Assurance Society in London, and there saw Mr. Nettleton, the secretary or actuary of the society, and paid the premium of £26 then payable in respect of the said policy.

15. Whall states that on that occasion he told Mr. Nettleton that the policy had been assigned to Girdler, who was his (Whall's) client, and also to another client of his, by way of mortgage. Whall states that he further told him that the moneys applicable to keeping alive the policy were

1875

Alletson v. Chichester.

heavily incumbered by subsequent deeds, and that he inquired of Mr. Nettleton whether the bonuses which had at that time accrued in respect of the policy could be applied in reduction of the annual premium payable thereon. In reply to Mr. Nettleton's answer to Whall's inquiry, Whall states that he told Mr. Nettleton that the reduction he offered to make on behalf of the insurance society was not such as to justify the mortgagees in making or concurring in such arrangement. Whall is unable to state at this distance of time the exact words used by him at the said interview; but he states that they were to the above effect, and as explicit as above stated. Mr. Nettleton, however, has no recollection of any such transaction.

324] *16. At the same interview Whall asked Mr. Nettleton what was the decision of the society in respect of the proposed loan to the Worksop Local Board of Health mentioned in the letter of the 25th of August, 1858, and was informed that the security could not be accepted by the society.

17. By deed dated the 6th of May, 1861, Girdler, in consideration of £500 paid to him by Joseph Boaler, assigned and transferred to Boaler, his executors, administrators, and assigns, the said security of the 25th of August, 1845, and the said policy of assurance, and the sums of money thereby assured, with full power and authority for him or them as the attorney or attorneys of Girdler, his executors or administrators, to sue for the said sums which should eventually become payable under the said policy and the said sum of £500 and interest, and to give effectual discharges for the said sums respectively. No notice of this assignment or transfer was given to the society.

18. Whall acted as the attorney and solicitor of Girdler and also of Boaler in all matters relating to indenture of the 6th of May, 1861.

19. There was no statement in the affidavits upon which the matter was before Hannen, J., as to there being any usage of the society in respect of notices of transfers of policies.

20. Russell was adjudicated a bankrupt on the 25th of June, 1862. He obtained on the 2d of August, 1862, an order of discharge, under the hand of the commissioner and under the seal of the Court of Bankruptcy for the Leeds district. Whall did not act as the attorney or solicitor for Russell in the matters relating to his bankruptcy.

21. In the balance-sheet filed by Russell on his bankruptcy, Boaler was entered as a creditor holding a mortgage of the

freehold and leasehold hereditaments in Sheffield and also the policy of assurance.

22. Boaler died on the 6th of January, 1867, and the plaintiffs are the executors under his will.

23. The annual notices for the renewal of the policy and also notices of all bonuses accruing thereon were on all occasions sent to Whall by the secretary or actuary for the time being of the Legal and General Life Assurance Society. All the premiums *were paid by Whall; and, since the [325 time of his entering into receipt of the rents and profits of the hereditaments and premises at Sheffield, the premiums were paid by Whall out of such rents and profits. The society allowed Whall a commission on the sums so paid.

24. The policy, which was not under seal, has always been retained in the possession of Whall from the time when it was sent to him, and it was never in the possession of Russell.

25. The principal sum of £500 secured by the indenture of the 25th of August, 1845, and the transfer thereof, with an arrear of interest, is still due to the plaintiffs.

26. Thomas Taylor, of East Retford, who was appointed trade assignee under the bankruptcy of Russell, is dead. No fresh assignee was appointed. The proceedings in the bankruptcy were transferred from the Leeds Bankruptcy Court to the County Court of Yorkshire holden at Sheffield, under the provisions of the Bankruptcy Act, 1869.

27. Neither the official assignee nor the creditors' assignee appointed under the bankruptcy ever made any claim to be entitled to the policy or the money thereby secured during the lifetime of Russell, nor after his death, until after the commencement of this action.

28. On the 14th of August, 1871, Whall wrote and sent to Mr. Nettleton, as the actuary of the Legal and General Life Assurance Society a letter, as follows:

“Worksop, 14 August, 1871.

“Policy 2,644.

“Dear Sir,—I have to inform you that this assured, Mr. Samuel Russell, died last week, and was buried at Blyth on Friday, the 11th instant. I act for the assignee of this policy, and shall be obliged by your furnishing me with the necessary forms for proving the death of the assured.

(Signed) “John Whall.”

29. On the 28th of October, 1871, W. H. Haycock, acting on behalf of a creditor of Russell, wrote to the society informing them that Russell had been adjudicated bankrupt in 1862.

1875

Alletson v. Chichester.

30. The claimants, the registrars of the County Court at Sheffield now represent the official assignee in the bankruptcy of Russell.

326] *31. On the 10th of June, 1872, this action was commenced by the plaintiffs against the defendants, as directors of the Legal and General Life Assurance Society, being the persons liable to be sued, to recover the amount payable by the society under the policy. On the 2d of July, 1872, the declaration in this action was served.

32. An interpleader summons having been taken out by the society, it was ordered by Hannen, J., that the society should pay into court the amount payable under the policy, being £1,322, to abide the decision of a special case to be stated, as hereinbefore mentioned.

33. The court were to be at liberty to draw any inferences of fact which a jury might have drawn; and the documents therein referred to were to be taken as part of the case. It is to be taken for the purposes of this case, but not otherwise, that an order for sale under the 125th section of the Bankruptcy Act, 1849 (12 & 13 Vict., c. 106), has been duly obtained.

The question for the opinion of the court was, whether the plaintiffs or the registrars of the County Court of Sheffield are entitled to have the said sum or any and what part thereof paid over to them, subject to any order which may be made by this court respecting the costs. And the court may direct to whom and in what way the moneys shall be paid out of court, or be otherwise disposed of, or what accounts, if any, are to be taken, and by whom and where.

Lumley Smith, for the plaintiffs: The material facts are substantially these: On the 23d of August, 1845, a policy for £1,000 was effected with the Legal and General Life Assurance Society upon the life of Samuel Russell. On the 25th of the same month, Russell assigned the policy to Girdler by way of mortgage, to secure an advance of £500; and in March, 1853, there was a further charge upon the same policy to one Radley. On the 27th of August, 1858, Whall, who was solicitor for all the parties, having previously (on the 25th) written a letter to the secretary of the society informing him that he was about to call and pay the premium due upon the policy, and to confer with him upon 327] the subject of a proposed loan by the office *to another client of his, went to the office of the society and there saw the secretary, and told him of the charges upon the policy in question. In May, 1861, Girdler assigned all his interest

in the policy to Boaler, whose personal representatives the plaintiffs are. In June, 1862, Russell became bankrupt, and he died on the 11th of March, 1871. On the 14th of March, 1871, notice of the death was sent to the society by Whall; and on the 28th of October, 1871, they received from a creditor of Russell notice of his bankruptcy. This action was commenced by the executors of Boaler on the 10th of June, 1872; and no claim was made in respect of the policy by the assignees under Russell's bankruptcy until after that time. There had been another policy on the same life effected with the Law Union Fire and Life Insurance Company, and that company, on receiving notice of the assignment and of the death of Russell, and afterwards notice of his bankruptcy, paid the amount of the policy into court under the Trustee Act: and the notice of the assignment, though given after the death of the assured, was held to be a sufficient notice to take the policy out of the order and disposition clause of the Bankruptcy Act: *Re Russell's Policy Trusts*⁽¹⁾. Here, the plaintiffs rely upon the notice given by Whall to the secretary of the society in 1858. Whatever doubt might formerly have existed upon the subject, it has long been settled that a life-policy is within the reputed ownership clauses: *Ex parte Cooper*⁽²⁾; *Ex parte Rose*⁽³⁾; *Ex parte Smith*⁽⁴⁾; *Ex parte Heathcote*⁽⁵⁾. The question of reputed ownership is purely one of fact: *Hamilton v. Bell*⁽⁶⁾. The notice, to take the policy out of the order and disposition of the bankrupt, need not, before the 30 & 31 Vict. c. 144, have been in writing; mere knowledge in the office, acquired in the course of the transaction of the business of the company, will be sufficient: *Ex parte Stright*⁽⁷⁾; *Ex parte Waithman*⁽⁸⁾; *Ex parte Masterman*⁽⁹⁾; *Tibbitts v. George*⁽¹⁰⁾; *Smith v. Smith*⁽¹¹⁾; *Gale v. Lewis*⁽¹²⁾; **Morris v. Cannan*⁽¹³⁾; *Ex parte Agra Bank, re Worcester*⁽¹⁴⁾. The facts stated in paragraphs 13-15 of the special case abundantly bring the present case within the rule, and show that the defendants had notice of the assignment of the policy to Girdler before Russell's bankruptcy; for, it will scarcely be contended that the secretary or actuary of an insurance office is not the proper person to receive such a notice on their behalf.

⁽¹⁾ Law Rep., 15 Eq., 26.⁽²⁾ 2 M. D. & De G., 1.⁽³⁾ 2 M. D. & De G., 181.⁽⁴⁾ 2 M. D. & De G., 213.⁽⁵⁾ 2 M. D. & De G., 711.⁽⁶⁾ 10 Ex., 545; 24 L. J. (Ex.), 45.⁽⁷⁾ 2 D. & Ch., 314.⁽⁸⁾ 4 D. & Ch., 412.⁽⁹⁾ 4 D. & Ch., 751.⁽¹⁰⁾ 5 A. & E., 107.⁽¹¹⁾ 2 C. & M., 231.⁽¹²⁾ 9 Q. B., 730; 16 L. J. (Q.B.), 119.⁽¹³⁾ 4 D. F. & J., 581; 31 L. J. (Ch.), 425.⁽¹⁴⁾ Law Rep., 3 Ch., 555.

1875

Alletson v. Chichester.

Gould (Day, Q.C., with him), for the defendants: There was no sufficient notice of the assignment to take this policy out of the order and disposition of the bankrupt. The secretary of an insurance company is, no doubt, for a variety of purposes, an officer whose acts will bind his principals: but the facts disclosed in this case do not amount to notice of the assignment to him. The utmost that can be said (assuming Whall's recollection to be accurate) is, that the fact of the assignment was mentioned in the course of a conversation about another transaction. It is evident that neither Whall nor Nettleton attached any importance to the statement at the time: and, if it had been understood by the latter to amount to a notice, some record would have been made of the fact. The case therefore differs materially from *Ex parte Agra Bank*.⁽¹⁾ Lord Justice Selwyn there says⁽²⁾: "I quite agree with the observation of the Master of the Rolls in the case of *North British Insurance Co. v. Halllett*⁽³⁾, that, 'if persons met in society, and, over the dinner table, or in casual conversation, an officer of the company heard the fact of the assignment mentioned, this, even though the speaker were the person who made the assignment, would not be sufficient notice;' and that, on the same principle as in the other case to which I alluded in the argument,—*Edwards v. Martin*⁽⁴⁾,—casual notice to the secretary will not be sufficient." With regard to *Re Russell's Policy Trusts*⁽⁵⁾ the assignees there, by not giving notice to the office, enabled the bankrupt to commit a fraud upon an innocent person; and that was the real ground of the decision of Vice-Chancellor Malins.

LORD COLERIDGE, C.J.: I am of opinion that our judgment should be for the plaintiffs. The question arises on 329] the sufficiency *of a notice given to a life assurance society of the assignment of a policy so as to take it out of the order and disposition of the assured, who after effecting the policy and after the assignment became a bankrupt. The insurance was effected in 1845. At that time written notice of the assignment to the office was not necessary. The policy was, shortly after it was effected, assigned to persons whom the plaintiffs represent. The bankruptcy of the assured took place in the year 1862. The question really turns upon the sufficiency of the notice of that assignment given in August, 1858, which was anterior to the bankruptcy. That is the sole question which it becomes necessary for us

⁽¹⁾ Law Rep., 3 Ch., 555.⁽³⁾ 7 Jur. (N.S.), 1263.⁽²⁾ Law Rep., 3 Ch., at p. 562.⁽⁴⁾ Law Rep., 1 Eq., 121.⁽⁵⁾ Law Rep., 15 Eq., 26.

to consider; for, if that was a valid notice, the other questions which were argued before us are immaterial. There is, no doubt, much force in the observation of Mr. Lumley Smith, that it is very difficult to apply the rules of bankruptcy as to order and disposition to property of this sort. However, it has more than once been decided that they are applicable, and it is now too late to dispute it. The courts, then, having decided that a policy of assurance though assigned may still be in the order and disposition of the bankrupt, unless notice of the assignment has been given to the office, and that such notice, if given, will defeat the claim of the assignees in bankruptcy, the question is, whether the notice which was given in this case was sufficient. The principles upon which that question is to be decided have been the subject of discussion in a variety of cases. It is clear, to begin with, that the notice need not be in writing, nor directly in a transaction with reference to the policy itself. It has been held that knowledge of the fact of the assignment communicated in any other matter of business will suffice. It has also been held that notice to a director, or to the actuary or secretary, or to any other officer of the company whose duty it is to communicate the fact to the company, will bind them and defeat the claims of the assignees in bankruptcy. This was decided in *Edwards v. Scott*⁽¹⁾ and *Edwards v. Martin*⁽²⁾, and also in the important case of *Gale v. Lewis*⁽³⁾, where all the earlier authorities are cited. That being the state of the law, what are the facts here? They will be found in paragraphs 14 * and 15 of the special case. [His Lordship 330 read them.] Now, the statement of Mr. Whall (whose credibility is not impeached) contains direct evidence of notice; and it is not qualified by the mere absence of recollection on the part of Mr. Nettleton. That statement amounts in substance to this, that, in the month of August, 1858, Whall called at the office of the Legal and General Life Assurance Society in London in order to pay the premium on this policy, and that he there saw Nettleton, the secretary or actuary, and told him that the policy had been assigned to Girdler, who was a client of his, and also to another client; and that Whall further inquired of Nettleton whether the bonuses which had at that time accrued in respect of the policy could be applied in reduction of the annual premium payable thereon; and that, in reply to Nettleton's answer to that inquiry, Whall told him that the

⁽¹⁾ 1 M. & G., 962.⁽²⁾ Law Rep., 1 Eq., 121.⁽³⁾ 9 Q. B., 730; 16 L. J. (Q.B.), 119.

1875

Alletson v. Chichester.

reduction he offered to make was not such as to justify the mortgagees in entering into the arrangement. Now, power is reserved to us by this special case to draw inferences of fact; and, dealing with the statements therein contained according to the recognized principles, it appears clear to me that Nettleton was the very person to whom it was proper to give a notice of this kind, and that such a notice was given to him. The conclusion I come to therefore is, that, in August, 1858, the office had notice of the assignment of the policy, that the decided cases are enough to prevent the application of the order and disposition clauses of the Bankruptcy Acts, and that the title of the assignees of the policy was complete so as to prevent the policy passing to the trustee or assignee under the bankruptcy of Russell, and consequently that the plaintiffs are entitled to our judgment.

KEATING, J.: The policy in question was effected in August, 1845. On the 25th of that month it was assigned to one Girdler by way of security for an advance of money. In 1862, the assured became a bankrupt; and the question is whether,—it having been decided that policies of assurance on lives may be within the order and disposition clauses of the Bankruptcy Acts,—this policy was at the time of the bankruptcy of the assured in his order and disposition with the consent of the true owner, Girdler; and that depends upon whether before and at the time of his bankruptcy, 331] *in 1862, Russell, the assured, had the consent of the true owner to his being the apparent owner of the policy; or, in other words, whether a notice had been given to the Legal and General Assurance Society on behalf of Girdler that he was the true owner thereof. Now, in 1858 (which was before Russell's bankruptcy), the communication took place which is relied upon by the plaintiffs as a notice of assignment. On the 25th of August in that year, Whall, who was the authorized agent of Girdler, writes to the secretary or actuary of the society,—“I shall have occasion to call upon you on Friday next, the 27th inst., with the premium payable on policy No. 2,644,” the policy in question. Accordingly, on the 27th of August, Whall did call at the office of the society in London, and paid the premium. There can be no doubt that Whall intended accurately to represent the conversation which took place between him and Nettleton upon that occasion; and it appears to me that the notice given was a very precise notice, and it was, I apprehend, given to one who was quite justified and called upon to accept the notice in the terms in which it was given. It was a distinct notice of an assignment of the policy to

Girdler, and it was given to one who was the proper person to receive such a notice on behalf of the society. *Gale v. Lewis* (') goes the whole length of saying that knowledge of the person who is competent to receive notices on behalf of the company is the knowledge of the company, even though the notice has not been communicated to the company. If so, Nettleton, who was the proper person to receive notice on behalf of the assurance society, having acquired knowledge of the assignment, I am of opinion that that was the knowledge of the society, and was sufficient to determine the consent of the true owner to the policy remaining in the order and disposition of the assured. I therefore agree with my Lord that the plaintiffs, who are the executors of Boaler, the assignee of the policy, are entitled to our judgment.

GROVE, J.: I am of the same opinion. There is much force in the observation of Mr. Gould that a matter of this sort is not to be determined by a mere casual conversation; but that the circumstances *ought to be such that the [332 court may fairly infer from them that the notice of the assignment reached the company,—that it was given to a person whose duty it was to receive it as a matter of business on behalf of the company. Looking at paragraphs 13–15, I am clearly of opinion that there was such a notice given here as the secretary could receive and did receive in the course of discussing business connected with this subject. The letter of the 25th of August is addressed to Mr. Nettleton, the secretary. The first part of it relates to a negotiation for the loan of a large sum of money for other clients of Mr. Whall. It then goes on,—“I shall have occasion to call upon you on Friday next, the 27th instant, with the premium payable on policy No. 2,644, and will take that opportunity of conferring with you on the subject of the loan.” That letter appears to me to be important as showing that Nettleton was a person with whom Whall was conferring upon important business of the society. Nettleton receives Whall in that capacity; and in the course of that conference Whall tells him that the policy in question has been assigned to Girdler, a client of his, by way of mortgage. He tells him that the moneys applicable to keeping alive the policy are heavily incumbered by subsequent deeds; and he inquires of him whether the bonuses which had at that time accrued in respect of the policy could be applied in reduction of the annual premium payable thereon. That was a matter of the greatest importance to the society. In reply to the secretary’s proposition as to the bonuses, Whall states

(') 9 Q. B., 730; 16 L. J. (Q.B.), 119.

1875

Alletson v. Chichester.

that he told him that the reduction he offered to make on behalf of the insurance society was not such as to justify the mortgagees in concurring in such arrangement. Here is a detailed account of a conversation with the secretary upon a matter of business of importance to the society; and I think it goes far beyond what has been held in some of the cases cited by Mr. L. Smith sufficient to fix the company. It is distinctly brought to the knowledge of the proper officer of the society that the policy is no longer in the hands of the original assured, but has been assigned by him: it is not a fact which was incidentally mentioned in the course of a conversation.

DENMAN, J.: I am of the same opinion. I cannot help 333] thinking *that the case is a very clear one. We stand in the position of a jury as well as a court for administering law. The first question, which is rather one of law than of fact, is, whether Mr. Nettleton, the secretary or actuary of the society, was a proper person to receive such a notice or intimation as that now under consideration. I think he was a person who had authority to receive such a notice so as to bind the society. The next question is, what is the fair effect of the conversation which took place between him and Whall on the 27th of August, 1858. In my judgment it so clearly amounted to notice that the policy had been assigned, that, if the question had been left to a jury, and they had found otherwise, the court would have been bound to set aside their verdict as unsatisfactory.

Judgment for the plaintiffs.

Gould prayed that the court would, as was done in *Edwards v. Martin* (¹), direct the costs to be paid out of the estate, and not by the defendants personally, they being official persons, and having no assets.

LORD COLERIDGE, C.J.: We see no reason why we should depart from the ordinary course.

Judgment for plaintiffs, with costs.

Attorney for plaintiffs: *W. H. Tattam.*

Attorneys for claimants: *Dobinson Geare & Son, for A. S. Wake, Sheffield.*

(¹) Law Rep., 1 Eq., 121.

[Law Reports, 10 Common Pleas, 334.]

Jan. 27, 1875.

*CLARE V. LAMB and Another.

[334

Sale of Leaseholds—Equity of Redemption—Covenant for Title—Money had and received—Failure of Consideration.

Leasehold premises were mortgaged by S., who subsequently married L. After the death of L. his executors concurred in a sale by the mortgagee to C., and received the balance of the purchase-money after payment of the mortgage debt, interest and expenses, and, in the *bona fide* belief that L. was legally entitled to the equity of redemption, disposed of such balance as part of his estate. S., the widow of L., afterwards filed a bill against C., the purchaser, to recover the property, and obtained a decree against him for the value of the equity of redemption,—C. being treated as assignee of the mortgage:

Held, that C. could not recover back the money paid to the executors, as upon a failure of consideration: but must have recourse to his remedy upon the covenant for title, if any.

ACTION for money had and received. Plea, never indebted.

The cause was tried before Keating, J., at the sittings at Westminster after Easter Term, 1874. The facts were as follows: A Mrs. Steiner, who possessed seven leasehold houses in the Mile End Road, mortgaged them in 1863 to one Dodd for £300, and afterwards further charged them with £100 to a Mr. Watson. In 1864, Mrs. Steiner married Dr. Lamb, who died in 1869, having by his will appointed the defendants his executors. Shortly after the death of Dr. Lamb, Dodd, the first mortgagee, with the concurrence of the executors, put the premises up for sale by public auction, and Clare, the plaintiff, became the purchaser for £785. The purchase-money was with the sanction of the executors applied in part in paying off the two mortgages and in paying the expenses of the sale and conveyance; and the balance, £241 8s. 2d., was paid by Clare to the executors. The conveyance was executed by all the parties, and Clare received possession of the premises from Dodd. The deed contained no covenant for title in the executors.

In 1872, Mrs. Lamb, the widow of Dr. Lamb, discovering that she was entitled to the property, filed a bill in chancery against Clare to recover possession. Clare gave notice of this claim to the defendants, Dr. Lamb's executors. On the 21st of February, 1874, a decree was pronounced in the suit, treating Clare as the *assignee of the mortgagees, and [335 directing an account, and that the surplus, after deducting the mortgage-money, interest, and expenses, should be paid

1875

Clare v. Lamb.

over by Clare to Mrs. Lamb. Clare then (in October, 1873,) brought this action against the defendants to recover back the money which he had been called upon to pay to Mrs. Lamb, viz., the value of the equity of redemption.

The learned judge nonsuited the plaintiff, on the ground that under the circumstances money had and received would not lie; but he reserved leave to the plaintiff to move to enter a verdict for him for £240, the agreed value of the equity of redemption, if the court should be of opinion that the action was maintainable.

H. Matthews, Q.C., in Trinity Term last, obtained a rule nisi accordingly, on the ground that the money was paid under a mistake, and that there was a total failure of consideration for the payment. He cited *Hitchcock v. Giddings* (¹), *Bos v. Helsham* (²), and *Cooper v. Phibbs* (³).

Jan. 27, 1875. *Garth*, Q.C., and *Charles*, showed cause: The sale took place under a mistake: all parties assumed that the balance of the purchase-money, after paying off the mortgages, would form part of Dr. Lamb's estate. Under these circumstances, there being no covenant for title on the part of the executors, the maxim *caveat emptor* applies, and the purchaser cannot recover back the money which the vendors have innocently received: *Bree v. Holbech* (⁴); *Cripps v. Reade* (⁵); *Johnson v. Johnson* (⁶); Sugden's Vendors and Purchasers, 13th ed., p. 440; Dart's Vendors and Purchasers, 4th ed. 711; 4 Cruise's Digest, p. 90; Broom's Maxims, 5th ed., p. 773. The very object of a person in a fiduciary position entering into covenants limited to his own acts and defaults only, is, to save him from responsibility for the acts and defaults of third parties: *Thackeray v. Wood* (⁷), *Bos v. Helsham* (²), and *Cooper v. Phibbs* (³) are altogether beside this case; and in *Hitchcock v. Giddings* (¹) the money had not been paid, and the purchaser was relieved against a bond given to secure it, on the 336] *ground of fraud. Further, this action is prematurely brought: the decree which declared Mrs. Lamb to be entitled to the equity of redemption was not pronounced until the 21st of February, 1874, which was after the commencement of the action.

Bosanquet and *Bompas*, in support of the rule: The defendants professed to sell a thing which they had not, and the plaintiff parted with his money without any considera-

(¹) 4 Price, 135.

(⁴) 2 Doug., 654, a.

(⁵) Law Rep., 2 Ex., 72.

(⁶) 6 T. R., 606.

(⁷) Law Rep., 2 H. L., 149.

(⁸) 3 B. & P., 162.

(¹) 6 B. & S., 766; 34 L. J. (Q.B.), 226.

tion. It is no answer for the former to say that they have paid it over to the legatees under the will of Dr. Lamb: they are not without remedy. In all cases where money is paid under a mistake of fact, it may be recovered back. The origin of this doctrine is thus stated in Spence's Equity Jurisdiction, pp. 622, 623: "The Roman law enabled a person to avoid a contract on the ground of mistake, and that although it was his own mistake. It was considered a fraud to endeavor to take advantage of a stipulation entered into under a plain mistake. As regards mistakes arising from ignorance, a distinction was taken between ignorance of law and ignorance of fact. A person could not set up the former as a ground to avoid an obligation. But it was not in every case that ignorance or mistake as to fact was available: no help was given where the ignorance arose from gross negligence or folly. A distinction was taken by Papinian in regard to ignorance of law: according to him, if a man had been induced by his ignorance of law to part with what was his own, he might recover it, or be placed in *statu quo*; but the pretence of ignorance of law could not be used to enable a person to acquire what had not been his own, or to better his condition. A person might not only defend himself from a demand made on him by reason of a contract entered into in ignorance or mistake of fact, but he might recover back money paid by mistake arising from such ignorance. As regards a sale, mistake as to the *materia* or *corpus* annulled it." Wherever a mistake goes to the whole root of the transaction, it may be rectified. *Bree v. Holbech* (1) was substantially a decision upon the Statute of Limitations: that part of the judgment which is relied on for the defendants was a mere *obiter dictum*. The general position laid down in Sugden and in Dart, that, where a conveyance has been executed and the money paid, the transaction cannot be *ripped up for a defect of [337 title subsequently discovered, but that the remedy is upon the covenant, is not disputed. But this is not the case of a defective title: the defendants had not the things they professed to sell and convey.

[GROVE, J.: I sell you a farm, and execute a conveyance without any covenant for title, and it ultimately turns out, without any fraud on my part, that I had no title: can that be called a mistake?]

There would be a total failure of consideration. In Story's Equity Jurisprudence, 10th ed., § 142, it is said: "In cases of mutual mistake, going to the essence of the contract, it

(1) 2 Doug. 654, a.

is not necessary that there should be any presumption of fraud. On the contrary, equity will often relieve, however innocent the parties may be. Thus, if one person should sell a messuage to another, which was at the time swept away by a flood or destroyed by an earthquake, without any knowledge of the fact by either party, a court of equity would relieve the purchaser, upon the ground that both intended the purchase and sale of a subsisting thing and implied its existence as the basis of their contract. It constituted, therefore, the very essence and condition of their contract." Again, he says, § 143: "The same principle will apply all other cases where the parties mutually bargain for and upon the supposition of an existing right. Thus, if a purchaser should buy the interest of the vendor in a remainder in fee expectant upon an estate-tail, and the tenant in tail had at the time, unknown to both parties, actually suffered a recovery, and thus barred the estate in remainder, a court of equity would relieve the purchaser in regard to the contract, purely on the ground of mistake." For both these propositions, *Hitchcock v. Giddings* (1) is cited. In that case, the purchaser had given a bond for the purchase-money; and the court restrained the vendor from enforcing it, on the ground that he had in ignorance sold that which in fact had no existence. Technically the judgment of Chief Baron Richards puts it as a case of fraud: but in substance and in truth it was a total failure of consideration. It would be manifestly contrary to good faith in the defendants to retain this money under the circumstances.

338] [*DENMAN, J., referred to *Lindon v. Hooper* (2) and *Newsome v. Graham* (3).]

As to the objection that the action was prematurely brought,—the position and rights of Mrs. Lamb were ascertained at the time of the issuing of the writ, though the decree had not then been actually pronounced.

GROVE, J.: We are all agreed: but my Lord, being somewhat indisposed, has requested me to deliver my judgment first.

I am of opinion that the nonsuit was right, and that the rule should be discharged. The question arises thus: Certain property was sold by auction, and by the conveyance, to which the defendants were parties, a mortgage was transferred to the purchaser, and the equity of redemption, the value of which was agreed to be £240, was also conveyed to the purchaser. It turned out that, so far as the equity of

(1) 4 Price, 135.

(2) 1 Cowp., 41.

(3) 10 B. & C., 234.

redemption was concerned, the title of the vendors was wholly defective. Their testator, Dr. Lamb, having died, it was discovered that the equity of redemption was in his widow; and she filed a bill in equity, and a decree was made declaring her to be entitled to it. The question submitted at the trial was, whether the purchaser, having paid £240 for property to which the vendors had no good title, could recover back that sum as money had and received, upon a failure of consideration. In answer to the plaintiff's claim, it is contended that the maxim *caveat emptor* applies; and that, the defendants, as executors, having acted *bona fide* and in the belief that they had a good title, the plaintiff must take what he has got, and cannot recover back the money he has paid. It seems to me, upon principle, irrespective of the authorities, that the maxim referred to applies *a fortiori* to this case. If a man goes into a shop to buy a chattel, the seller, especially if he be the manufacturer, must necessarily know more of the nature and quality of the article than the buyer can. In that case, the rule *caveat emptor* is often a hard one, and yet it generally applies. In the case of the purchase of an interest in land, the person who sells places at the disposal of the buyer such title-deeds as he possesses and under which he claims. The purchaser has full *opportunity for investigating the [339 title of the vendor, and when he takes a conveyance he is assumed to have done so. Considerable inconvenience might result if this were not the rule. Conveyancers may agree upon the title, and, long after the conveyance has been executed, the whole transaction completed, and the proceeds disbursed, the seller might be called upon to return the purchase-money, by reason of some defect of which he had no notice at the time.

But there is an ordinary and well-known covenant which the purchaser may insist upon if he wishes to get more security that he gets by an investigation of the title; he may require a covenant for title; this additional security would probably increase the price. When the conveyance has been executed, all that the purchaser has to look to is the liability of the vendor under the deed. If it contains no covenant for title, the purchaser takes what the vendor gives him, or, rather, what he is able upon his title to give him, and the vendor will only be responsible for his own acts and incumbrances. Such I believe to be the general doctrine.

Now, the principal authorities upon the question before us are *Bree v. Holbech* ⁽¹⁾, *Johnson v. Johnson* ⁽²⁾, *Cripps v.*

(1) 2 Doug., 854, a.

(2) 3 B. & P., 162.

1875

Clare v. Lamb.

Reade ⁽¹⁾, and *Hitchcock v. Giddings* ⁽²⁾. In addition to these, we have the high authority of one of the most eminent judges and writers upon the law of real property, viz., Lord St. Leonards. In *Bree v. Holbech* ⁽³⁾, the defendant, a personal representative, having found among the papers of the deceased a mortgage-deed for £1,200, assigned it to the plaintiff for a valuable consideration, the deed of assignment reciting that it was a mortgage-deed made or mentioned to be made between the mortgagor and mortgagee for that sum; and, after the lapse of six years, it was discovered that the supposed mortgage-deed was a forgery, and the purchaser thereupon brought money had and received to recover back the sum he paid for it. But Lord Mansfield said: "The basis of the whole argument is fraud. But here everything alleged in the replication may be true, without any fraud on the part of the defendant. He is an 340] administrator with the will annexed, who finds a *mortgage-deed among the papers of his testator, without any arrears of interest, and parts with it *bona fide* as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different. He did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it." That is a distinct authority to show that the purchaser must look to his covenant, and that the maxim *caveat emptor* applies. In *Johnson v. Johnson* ⁽⁴⁾ the purchaser was evicted for a defect of title after payment of the purchase-money, but before the conveyance was complete, and he was held to be entitled to recover back his money. Lord Alvanley thus expresses himself ⁽⁵⁾: "We by no means wish to be understood to intimate that, where under a contract of sale a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper covenants: where the vendor's title is actually conveyed to the purchaser, the rule *caveat emptor* applies." Nothing can be more specific than that. His Lordship goes on: "In the present case, the plaintiff never has had any title conveyed to him, and therefore we are of opinion, notwithstanding the party sued is a legatee, that the plaintiff has paid his money under a mis-

⁽¹⁾ 6 T. R., 606.

⁽⁴⁾ 3 B. & P., 162.

⁽²⁾ 4 Price, 135.

⁽⁵⁾ 3 B. & P., at p. 170.

⁽³⁾ 2 Doug., 654, a.

take: consequently, the rule adopted in courts of law in such cases applies to him, and entitles him to recover that money from the party to whom it has been paid, in an action for money had and received." Lord St. Leonards, at p. 441 of the 13th edition of his book on Vendors and Purchasers, sums up the result of the authorities thus: "But, if the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." For this he cites several cases in equity besides the cases I have already referred to. Not only have we the high authority of Lord St. Leonards for the doctrine I am adverting to, but the rule is substantially stated in the same terms in Dart's Vendors and Purchasers, 4th ed., p. 711. There is only one case which *prima facie* looks the other way, viz., *Hitchcock v. Giddings* ⁽¹⁾. There, a purchaser bought the supposed interest of the vendor in a remainder in fee expectant on an estate-tail, and it turned out that at the time of the contract the tenant in tail had suffered a recovery, of which both parties were ignorant until after the conveyance was executed and a bond given for securing the purchase money. The Court of Exchequer, in the exercise of its equitable jurisdiction, relieved the purchaser against the bond, on the ground of fraud. Lord Chief Baron Richards, in giving judgment, said: "This is certainly a charge of fraud; for, it is that the defendant, having no title to any interest in these estates at the time of the contract, bargained as if he had, and that thereby he prevailed on the plaintiff to give him this bond. Now, if a person sell an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, this is certainly a fraud, although both parties should be ignorant of it at the time; and that I believe to have been the case here. I must not be told that a court of equity cannot interfere where there is no fraud shown. If contracting parties have treated while under a mistake, that will be sufficient ground for the interference of a court of equity: but in this case there is much more. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive £5,000 and interest, because the conveyance is executed and a bond given for that sum as the purchase-money, when in point of fact I had not an inch of the land so sold to sell? That was precisely the case with the present defendant, and it would

(1) 4 Price, 135.

1875

Walrond v. Hawkins.

be hard indeed if a court of equity could not interfere to relieve the purchaser." The distinction between that case and the present is obvious,—there, the vendor was seeking to enforce performance of the contract by compelling the purchaser to pay for a thing he had not got; here, the plaintiff is calling upon the vendors to refund money which they honestly believed themselves to be entitled to when they received it. "*Potior est conditio possidentis.*" It does not appear to me that that case interferes with the doctrine laid down by the high authorities I have referred to, which, regard being had to the usual course of conveyancing, seems to me to be just.

342] *DENMAN, J.: I am entirely of the same opinion; and, after the full judgment pronounced by my Brother Grove, I think it unnecessary to say more.

LORD COLERIDGE, C.J.: I am of the same opinion. The rule is distinctly stated by Lord St. Leonards, and his conclusions are fully warranted by the cases before Lords Mansfield and Alvanley.

KEATING, J., concurred.

Rule discharged.

Attorney for plaintiff: *James Cooper.*

Attorney for defendants: *T. D. Bolton.*

[Law Reports, 10 Common Pleas, 342.]

Jan. 27, 1875.

WALROND V. HAWKINS.

Landlord and Tenant—Breach of Covenant not to be underlet, &c.—Waiver by Acceptance of Rent—Continuing Breach.

A lease of a farm contained a covenant on the part of the lessee not to "assign or demise to or permit any other person to occupy the premises, or any part thereof, without the consent in writing of the lessor," and a proviso for re-entry by the lessor for any breach. By agreement in writing the lessee underlet a portion of the farm to one T. for one year from the 31st of January, 1873, and the lessor, on the 30th of September, 1873, with knowledge of the underletting, distrained for and received rent due on the 29th:

Held, that the lessor had waived the breach of the covenant not to "assign or demise" without consent; and that the permitting T. to remain in the occupation of the land during the remainder of the year was not a new or continuing breach of the covenant not to "permit any other person to occupy" without consent.

EJECTMENT for a messuage called Perzwell, in the parish of Kentisbeare, in the county of Devon, upon an alleged forfeiture.

The particulars of breaches were twenty-one in number, as to the whole of which, save the first the evidence failed.

The first was as follows: "Non-performance of the covenant not to assign, demise, or permit any other person to occupy the said premises without the consent in writing of the said B. Walrond, by having on the 25th day of March, 1869, or subsequently, assigned and demised to one W. Denham, or permitted the said W. Denham to occupy, certain parts of the premises comprised in the said lease, and particularly the parts numbered 229, 721, and 768 in the tithe commutation map of the parish of Kentisbeare, to hold the same until the 25th of March, 1871, without the consent in writing of the said B. Walrond, or his assigns, for that purpose had and obtained."

The cause was tried before Keating, J., at the Spring Assizes, 1874, at Exeter. It appeared that the defendant became tenant of the farm in question under a lease from the plaintiff and another dated the 23d of March, 1868, for twenty-one years from the 25th of March, 1869; the lease contained, amongst others, a covenant on the part of the lessee not to "assign or demise to or permit any other person to occupy the said premises, or any part thereof, without the consent in writing of the said B. Walrond, his heirs or assigns, for that purpose being first had and obtained;" and also a clause of re-entry for breach of any of the covenants therein.

By agreement of the 31st of January, 1873, the defendant agreed to let unto one John Trood "twelve cows and heifers, to be chosen by Trood of the cows and heifers Hawkins might have in his possession, without any allowance for the same, for one year, for the sum of £144," payable quarterly. "The said cows and heifers (if any) to be fed and depastured on the following fields or lands, viz., Rootings and Nodbere for summer leases, Wellhead meadow for the mowing ground for the said cows, with the after-grass until the 1st day of November next, then to be given up to Hawkins. Trood to have part of the lower house now let with the said cows, and also the Home Orchard to run his pigs in; only August, September, October, or reasonable time excepted for saving the apples; but no pigs to run in any part of the said dairy ground; and also to keep them well ringed." "Trood to keep the lead and glass of the windows, and leave in good repair." "Trood to have half an acre of ground for potatoes or turnips, the crop to be taken away by the 25th of December." "Hawkins reserves power to keep the dairy cows on any part of the summer leases or any other ground after Christmas next, and also reserves power of ingress or egress with anything in any part of the said dairy

ground. Trood to help make the dairy hay free of expense. No poultry to be kept without consent of Hawkins. Trood 344] also *hereby agrees that he and his son Thomas will work daily for Hawkins; their wages to be, for Trood himself 10s. per week, and for his son Thomas 5s. per week." "Trood hereby agrees to take the said cows or heifers and dwelling-house for the said term under the said yearly rent, subject to the terms, conditions, and restrictions and agreements before written."

Whilst Trood was in possession of the parts of the farm mentioned in this agreement, viz., on the 30th of September, 1873, the plaintiff distrained for the quarter's rent which became due on the 29th, and the defendant paid it. There was evidence that the plaintiff was at that time aware of Trood's occupation of the pasturage for the cows. This action was brought before the expiration of the year.

The learned judge, upon being referred to a case of *Burt v. Moor* (1), ruled that the allowing Trood to occupy a portion of the demised land and premises in the way described in the agreement was a breach of the covenant not to "assign, demise, or permit any other person to occupy," contained in the lease of the 23d of March, 1868.

It was thereupon submitted on the part of the defendant, that, by the acceptance of rent under the distress, the plaintiff had waived the breach.

For the plaintiff it was insisted that, assuming that the plaintiff had waived the original breach, the subsequently allowing Trood to remain in occupation under the agreement was a continuing breach.

The jury found that the plaintiff was aware of the occupation by Trood at the time he received the Michaelmas rent.

The learned judge thereupon directed a verdict to be entered for the defendant; reserving leave to the plaintiff to move to enter the verdict for him on the first breach, if the court should be of opinion that there was a continuing breach.

Cole, Q.C., in Easter Term, 1874, obtained a rule *nisi* to enter a verdict for the plaintiff, on the ground that the letting of the dairy dwelling-house, as proved, to Trood, was a 345] breach *of covenant, and was not waived by the distress or acceptance of rent by the plaintiff. He referred to *Doe d. Ambler v. Woodbridge* (2).

Kingdon, Q.C., and *Charles*, showed cause: There was no doubt a letting in breach of the covenant: but it was

(1) 5 T. R., 329.

(2) 9 B. & C., 376.

known to the plaintiff at the time he distrained for and received payment of rent. The letting was for one year from the 1st of January, 1873; and the distress for the Michaelmas rent took place on the 30th September, 1873, with full knowledge on the plaintiff's part of the terms of the letting. The breach of covenant was complete on the 31st of January, 1873: the continuance of the state of things created by that breach was not a new or continuing breach. It is not like the case of a covenant to repair the premises and to keep them in repair, or a covenant to insure and keep them insured, where there is a fresh breach every day the premises remain out of repair or uninsured. *Goodright* d.

Walter v. Davids (*) is precisely in point. It was there held that, if a lessee covenants not to underlet without the consent of the lessor under hand and seal, with a power of re-entry in case of breach, acceptance by the lessor of rent due after the condition broken, with full notice, is a waiver of the forfeiture. And Lord Mansfield said: "The case is extremely clear. To construe this acceptance of rent due since the condition broken a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it, but accepts rent subsequently accrued. That shows he meant the lease should continue. Cases of forfeiture are not favored in law; and, where the forfeiture is once waived, the court will not assist it." In *Doe* d. *Ambler* v. *Woodbridge* (†), the covenant was that the tenant "should not alter, convert, or use the rooms then used as bed-rooms, or either of them, into or for any other use or purpose than bed or sitting-rooms for the occupation of himself, his executors, &c., or his or their family, without the license of the lessor in writing;" and the lease contained a clause of forfeiture for breach of any covenant. *The breach complained of was that the tenant had let part of the house to a lodger who occupied up to the time of the trial the rooms specified in the covenant: but the lessor had, after he knew of such occupation, received rent under the lease. Lord Tenterden ruled that "there was a continuing breach as long as the rooms were occupied contrary to the covenant:" and the court sustained his ruling, saying: "The conversion of a house into a shop is a breach complete at once, and the forfeiture thereby incurred is waived by a subsequent acceptance of rent. But this covenant is, that the rooms shall not be used for certain purposes. There was, therefore, a

(*) 2 Cowp., 893.

(†) 9 B. & C., 376.

new breach of covenant every day during the time that they were so used, of which the landlord might take advantage." The tenant there might at any time have ceased using the rooms in the prohibited manner: here, he could not determine Trood's occupation until the end of the year. In *Doe d. Flower v. Peck* (*) the breach was not insuring, pursuant to a covenant: and it was held that, though a distress for rent (with knowledge) was an acknowledgment of a tenancy and a waiver of the forfeiture to that time, yet a continuing omission to insure was a fresh breach. Parke, J., in delivering the judgment of the court, takes this distinction (*): "If this could be construed to be a covenant by the lessee to effect one policy of insurance immediately, and afterwards that he and his assigns should keep that particular policy on foot by continuing to pay the annual premiums on that policy, the assignee would not have been guilty of any breach of covenant if the lessee had never insured, for the policy never could have existed which the assignee was to continue; and the distress for rent would have been a waiver of the breach by the original lessee. But, if the covenant mean that the lessee and his assigns shall always keep the premises insured by some policy or another, then it is broken if they are uninsured at any one time; there is a continuing breach for any portion of time that they remain uninsured: and we are of opinion that this is the true construction of the covenant." Here, the breach of covenant was the act of letting a portion of the demised premises for 347] one year. The mere continuance of that *state of things after the waiver by acceptance of rent did not amount to a fresh breach.

Cole, Q.C. (Lopes, Q.C., and H. Clarke, with him), in support of the rule: The words of the covenant are, that the lessee shall not "assign or demise to or *permit any other person to occupy* the said premises, or any part thereof, without the consent in writing of the lessor," &c. Assuming that the demise to Trood was condoned by the subsequent acceptance of rent, the "permitting him to continue in the occupation of" the dairy house and land was a distinct breach, by which the lessee incurred a forfeiture. It is impossible to distinguish *Doe d. Ambler v. Woodbridge* (*) from the present case.

[GROVE, J.: The tenant did not let the dairy house, but assigned for a definite time by an underlease. The question is whether the continued occupation by the sub-lessee after a waiver of that breach is a continuing breach.]

(*) 1 B. & Ad., 428.

(*) 1 B. & Ad., at p. 438.

(*) 9 B. & C., 376.

All the plaintiff knew was that there was an underletting. [LORD COLERIDGE, C.J.: The finding of the jury is, that "the plaintiff was aware of *the* occupation of Trood at the time he distrained."]

In *Doe d. Muston v. Gladwin* (¹), A. demised premises to the defendant upon a lease containing a covenant by the tenant to insure and continue insured the buildings, &c., in the joint names of the landlord and tenant. In May, 1827, A.'s interest was assigned to B., who, on the 13th of January, 1843, assigned to the plaintiff. The defendant in 1836 insured the premises in his own name only, and kept the policy on foot by payment of premiums till the 27th of December, 1842, when the last premium was paid, being for the ensuing year. In 1839 the policy effected in 1836 was shown to B., who acquiesced in the form of it; and on the 12th of January, 1843, B. received the rent due at Christmas, 1842. In ejectment upon a demise laid in May, 1843, it was held that though, by the acquiescence of B. in the form of the policy, and by receipt of rent up to Christmas, 1842, there was a waiver by him of the breach of covenant up to Christmas, 1842, yet that, as the covenant was continuing, the non-compliance with the lease *in respect of the insur- [348
ance subsequently to that period entitled the plaintiff to re-
enter for the forfeiture. Patteson, J., in delivering judgment, relies upon *Doe d. Flower v. Peck* (²).

[GROVE, J.: The *ratio decidendi* in *Doe d. Muston v. Gladwin* (¹) is, that a breach of contract cannot be waived by a parol license to break it.

DENMAN, J.: Waiver is a question of mind and intention, not a pure question of law.]

There is a continuing duty here not to continue to permit any one to occupy any part of the demised premises, and a continuing breach of that duty; like the breach of a condition in a license to mine, that the license was to become void if the grantee should neglect to work the mines for a certain time: *Roberts v. Davey* (³): and see *Doe d. Griffith v. Pritchard* (⁴).

LORD COLERIDGE, C.J.: I am of opinion that this rule should be discharged. The sole question before us arises upon the construction of a few words in a lease, coupled with the finding of the jury. The plaintiff is seeking to take advantage of a forfeiture by reason of the breach of a covenant on the part of the defendant "not to assign or demise to or

(¹) 6 Q. B., 953.

(²) 1 B. & Ad. 428.

(³) 4 B. & Ad., 664.

(⁴) 5 B. & Ad., 765.

1875

Walrond v. Hawkins.

permit any other person to occupy the demised premises, or any part thereof, without the consent in writing of the lessor," &c. It appeared that the defendant did without consent demise a portion of the premises to one Trood for a year; and he thereby was unquestionably guilty of a breach of that covenant. The question is whether the right to re-enter for that breach has been waived. The demise from the defendant to Trood was dated the 31st of January, 1873; and whilst that lease was existing, viz., on the 30th of September, 1873, the plaintiff distrained for and accepted rent due on the 29th. The jury found that the lessor intended to waive and did waive the breach of the covenant not to demise, by accepting rent with knowledge of the underletting. I am of opinion that the acceptance of rent under the circumstances was a waiver. The covenant must be read dis-349] tributively,—that the lessee will not assign, or*(without assigning or demising) permit another to occupy any part of the demised premises; and not, as Mr. Cole contends, as one entire covenant. To hold that every day's occupation by Trood, although the defendant could not himself occupy during the remainder of the year, was a continuing breach, would be a most unreasonable construction of the covenant. None of the cases cited by Mr. Cole are directly in point. The two cases which come nearest to the present are *Doe d. Ambler v. Woodbridge* (*) and *Doe d. Muston v. Gladwin* (*). In the former, the plaintiff was allowed to recover because after the waiver of the breach by the first letting there was a continuance of the breach by allowing the rooms to be used contrary to the covenant, when the lessee might have prevented it. *Doe d. Muston v. Gladwin* (*) was a very hard case; and the court gave force to the objection with very great reluctance. The covenant was that the lessee, his executors, &c., would insure and continue insured in the joint names of himself, his executors, &c., and the lessor, his executors, &c. That covenant was never performed, the lessee having insured in his own name only. In January, 1843, the original lessor (who had received rent after notice of the informal nature of the policy) assigned his interest to the plaintiff, who brought ejectment against the lessee for not insuring according to his covenant. In giving judgment, Patteson, J., says (*): "There is nothing but verbal evidence that a landlord had said that he would be satisfied though the covenant should be broken, which it indisputably was during the whole time that the premises remained uninsured contrary to the covenant; for the waiver by acceptance of

(*) 9 B. & C., 376.

(*) 6 Q. B., 953.

(*) 6 Q. B. at p. 963.

rent could not operate beyond Christmas, up to which period that rent was accepted; and, this being a continuing covenant, a subsequent breach entitled the lessor of the plaintiff to re-enter." Assuming that case to have been well decided, it is by no means this case. There was a possibility of the state of things being altered at any moment by the person proceeded against: he might have got the form of the policy altered: failing to do so, he was guilty of a continuing breach or of a repetition of the breach day by day so *long as the covenant was uncomplied with. Here, [350 however, there was but one single breach. The lessee could not determine the tenancy of Trood until the 31st of January, 1874: and the lessor, with full knowledge of the state of things, accepted rent. *Goodright d. Walter v. Davids* (1) is directly in point. There, a lessee who was under covenant, as here, not to underlet without consent, made an underlease for a year, and the forfeiture was held to be waived by a single acceptance of rent by the lessor with knowledge of the breach. "To construe this acceptance of rent due since the condition broken and waiver of the forfeiture," said Lord Mansfield, "is to construe it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it, but accepts rent subsequently accrued. That shows he meant the lease should continue." Those reasons are directly applicable here. Knowing of the demise for a year to Trood, the plaintiff, by his acceptance of rent, sanctions the continuance of that state of things for the year. If that case was rightly decided, *a fortiori* the conclusion I have arrived at in this case is right also. My Brother Denman has called my attention to a case of *Doe d. Gatehouse v. Rees* (2), where it was held that a forfeiture of a lease accruing on the lessee's insolvency was waived by acceptance of rent from him after his discharge under the Insolvent Debtors Act; and that the non-payment of a debt specified in his schedule to be due to the lessor was not a continual (general) insolvency, to constitute a new forfeiture after such acceptance of rent. That case seems to me to have a material bearing upon this. I think the direction of my Brother Keating was right, and that this rule must be discharged.

GROVE, J.: I am of the same opinion. The lessee was clearly guilty of a breach of covenant by underletting a portion of the premises for a year; but that breach was waived by the subsequent acceptance of rent with knowledge

(1) 2 Cowp., 803.

(2) 4 Bing. N. C., 384.

1875

Walrond v. Hawkins.

of that letting. Knowing that the dairy premises were let to Trood for a year, the lessor affirms that state of things, and 351] therefore the case is distinguishable *from *Doe d. Ambler v. Woodbridge* (¹), where, the lessee, having power to discontinue the unauthorized occupation of the rooms, allowed such unauthorized use of them to continue, and thereby committed a fresh breach of his covenant. Neither is the case within *Doe d. Muston v. Gladwin* (²), where a parol waiver of a breach of a covenant to insure in the joint names of lessor and lessee, by acceptance of rent by the lessor, with notice that the policy had been effected in the name of the lessee only, was held not to estop an assignee of the lessor from complaining of the unauthorized form of the insurance.

DENMAN, J.: I also am of opinion that the rule should be discharged. I think the case is governed by *Goodright d. Walter v. Davids* (³): The difficulty which exists here did not arise there. The tenant could not put an end to Trood's occupation until the expiration of the year. For the reasons given by my Lord, I think *Doe d. Ambler v. Woodbridge* (¹) has no application. The breach there complained of was a renewed act every week during which the sub-letting took place. In *Doe d. Muston v. Gladwin* (²) there had been a succession of landlords from time to time. Oliver, who became assignee of the reversion in 1837, had for several years sanctioned the form of policy of which the lessor of the plaintiff complained, by the acceptance of rent down to Christmas, 1843. It was contended on the part of the defendant that the forfeiture thus waived by Oliver could not be enforced by the lessor of the plaintiff (who had acquired his interest by assignment), at all events until after express notice to insure according to the covenant. Watson and Peacock, in showing cause, urged two arguments,—first, that the covenant to insure and keep insured was a continuing covenant, and therefore a waiver of forfeiture by Oliver in 1839 did not extend to subsequent forfeitures,—secondly, that the supposed assent, if it went further than the waiver of a past breach, must be relied upon as a parol dispensation with a contract under seal, which is contrary to the established rule of law. The judgment of the court seems to me 352] *to amount to this,—that, though Oliver might be bound by the principle laid down in *Pickard v. Sears* (⁴) and that class of cases, the lessor of the plaintiff was not estopped from insisting upon the performance of the cove-

(¹) 9 B. & C., 376.

(²) 6 Q. B., 953.

(³) 2 Cowp., 803.

(⁴) 6 A. & E., 469.

nant. That appears to me to be clear from the argument on the other side, in the course of which Patteson, J., observes, "You do not put the landlord's conduct as a dispensation; and yet you assert what clearly amounts to one,—an engagement by the landlord that as long as the premiums are paid he will not enforce the covenant." In giving judgment, the learned judge, after referring to the conduct of Oliver, says ('): "Under these circumstances, this ejectment must be considered as unusually harsh; and it is impossible for any court to lend itself willingly to enforce the proceeding. The expression that the law abhors a forfeiture was never more appropriate. But we must not forget that the legal rights of parties are all that we have power to deal with." Further, he says ('): "Since this lease, then, contains a proviso for re-entry in case of a breach of this covenant as well as that of others which may be thought more important, we have only to inquire whether it has been broken so that the landlord might maintain an action of covenant for the breach. That it has been broken is unquestionable; but the present landlord is said to be bound by the act of the former, who gave the defendant to understand that he should not require the performance of the covenant, but was satisfied with the substitution of a different mode of insuring. The case was likened to *Pickard v. Sears* (') and to some others, where it was held that a party may by his conduct so mislead another and so affect his interests as to deprive himself of the right to complain of what was afterwards done under an impression which he himself had produced; and a recent case of *Doe d. Pittman v. Sutton* (') was particularly brought forward. It seems, however, sufficient to observe that no case has gone to the length of intimating that a breach of covenant can be justified by a parol license to break it." That means that no case has gone the length of holding that the parol license would be good as against a subsequent landlord. Then, after *distinguishing *Doe d. Pittman v. Sutton* (') and *Doe* [353 *d. Knight v. Rowe* ('), the learned judge continues,—“But, in this case, there is nothing but verbal evidence that a landlord has said that he would be satisfied though the covenant should be broken, which it indisputably was during the whole time that the premises remained uninsured according to the covenant; for, the waiver by acceptance of rent could not operate beyond Christmas, up to which period that rent was accepted; and, this being a continuing covenant, a sub-

(') 6 Q. B., at p. 961.

(') 6 Q. B., at p. 962.

(') 6 A. & E., 469.

(') 9 C. & P., 706.

(') 2 R. & M., 343.

1875

Walrond v. Hawkins.

sequent breach entitled the lessor of the plaintiff to re-enter: *Doe d. Flower v. Peck* (').'' I cannot help thinking that all that was intended to be decided in that case was, that, though the original landlord was estopped, the present landlord was not. I think it important that the decision should not be supposed to go further than it really does. At all events, it is not in point here.

KEATING, J., concurred.

Rule discharged.

Attorney for plaintiff: *H. Samber, for F. Burrow, Col-lumpton, Devon.*

Attorneys for defendant: *Church, Sons & Clarke, for T. R. Densham, Bampton, Devon.*

(¹) 1 B. & Ad., 428.

See 9 Eng. Rep., 322 note.

As to the right to assign and under-let see an article, 7 Am. Law Review, 240-263.

It is essential to an underletting of demised premises that it be of a part only of the unexpired term. When the transfer is of the whole of a term, the person taking is an assignee and not an undertenant, although there be in form an underletting: *Bedford v. Terhune*, 30 N. Y., 453.

Where a lease is upon condition that the term shall be forfeited in case the lessee underlet without the lessor's assent, the term is not determined until re-entry by the landlord: *Shattuck v. Lovejoy*, 8 Gray, 204.

If a lease be upon condition that the lease shall not be assigned without the consent of the landlord, a consent by him to an assignment operates as a discharge thereafter of the covenant and the assignee may assign without such consent: *Siefke v. Keith*, 31 How., 383; *Dumpr's Case*, 4 Coke, 119 b.; see *Dakin v. Williams*, 17 Wend., 447, affirmed 22 Wend., 201; *Pennock v. Lyons*, 118 Mass, 92.

The receiving of rent, by a lessor, after acts by the lessee entitling the lessor to declare the lease forfeited, if the rent was accepted with a knowledge of those acts amounts to a waiver of the forfeiture: *Clarke v. Cummings*, 5 Barb., 340; *Tuttle v. Bean*, 13 Metc., 275; *Collins v. Cautes*, 6 Cush., 415.

But the lessor must voluntarily receive the rent. A payment into court by the lessee without acceptance thereof

by the lessor is not a waiver: *Tolman v. Portbury*, Law Rep., 6 Q. B., 245, affirmed in Exch. Cham., 2 Eng. Rep., 89.

So if the landlord during the pendency of a suit to recover the land on account of a forfeiture procure the appointment of a receiver of the rents and profits pending the litigation, this is not a waiver of the forfeiture: *Ireland v. Nichols*, 37 How. Prac., 222.

And a waiver of forfeiture by receiving rent must be with knowledge of the forfeiture: *Doe v. Bisch*, 4 Mees. & Welsb., 402; *Clarke v. Cummings*, 5 Barb., 340.

Merely writing the lessee unless you pay by such a day you are done with the land, is not a waiver: *Patchin v. Lamborn*, 31 Penn. St. R., 314.

So where a tenant by failure to repair has forfeited his rights, giving him notice to make the repairs, will not amount to a waiver of the forfeiture: *Pea v. Perkins*, L. R., 2 Excheq., 92; *Gregory v. Wilson*, 9 Hare, 683.

The rule that acceptance of rent may be held to be a waiver, is one of interest and may be rebutted: *Manice v. Millar*, 26 Barb., 41; *Ireland v. Nichols*, 2 Sweeney, 296.

See *Bowman v. Foote*, 29 Conn., 331, 1 Am. Law Reg., N. S., 352, 361 note.

The rule only applies to payment of rent which becomes due after the forfeiture, or to payment without the lessor having asserted a forfeiture: *Hunter v. Ousterhoudt*, 11 Barb., 33; *Bowman v. Foote*, 29 Conn., 331, 1 Am. Law Reg., N. S., 352, 361 note.

The landlord may even accept the rent without waiving such right if when receiving the rent he expressly reserves his rights under the forfeiture: *Kemball v. Rowland*, 6 Gray, 224.

Where the lessee covenants not to use the premises leased for any except certain purposes, an assignee of the lessee who took the assignment with the lessor's assent, will be restrained from using the premises for any prohibited purpose, even though the assignee did not, at the time of taking the assignment, in fact know of the conditions: *Dodge v. Lambert*, 2 Bosw., 570; *Moak's Van Santvoord's Pl.*, 364; *Parker v. Whyte*, 1 Hemming & Miller, 187.

A court of equity may relieve a tenant from a forfeiture of the lease if the forfeiture was through inadvertence, accident or mistake, on such terms as may be just: *Giles v. Austin*, 38 N. Y. Superior Court Rep., 215, affirmed by Court of Appeals, Sept. 21, 1875; 2 Story's Eq. Jur., §§ 1314-1326; *Rector, etc., v. Higgins*, 48 N. Y., 532; *Garner v. Hannah*, 6 Duer, 262; Smith's Man. Eq., 1st Am. ed., 368; Bispham's Eq., §§ 178-181; Willard's Eq., Potter's ed., 56.

But not where there is wilful, voluntary, gross, or inexcusable neglect: *Giles v. Austin*, 34 N. Y. Superior Court Rep., 171, Id., 540; *De Scarlett v. Dennett*, 9 Mod., 22; *Eaton v. Lyons*, 3 Ves., 690, 692-3; *Bracebridge v. Buckley*, 2 Price, 200; *Rolf v. Harris*, 2 Price, 206 note; *Reynolds v. Pitt*, 2 Price, 242 note, 19 Vesey, 134; *Hill v. Barclay*, 18 Ves., 56; *Livingston v. Tompkins*, 4 Johns. Chy., 421; *Baxter v. Lansing*, 7 Paige, 350, Bispham's Eq., § 181.

On the second trial of *Giles v. Austin* (38 Superior Court Rep., 215) the court found the neglect was excusable, so that the case was determined on different facts. We do not, however, understand the court on the second appeal to have shaken the law laid down on the first.

The cases of *Sanders v. Pope*, 12 Vesey, 282, and *Davis v. West*, 12 Vesey, 474, are qualified and substantially overruled in *Hill v. Barclay*, 18 Ves., 56, and *Bracebridge v. Buckley*, 2 Price, 200.

Relief in such cases is, however, confined to cases of covenant for the pay-

ment of money where the amount can be unquestionably fixed, and not to covenants to keep insured, etc.: *Hill v. Barclay*, 18 Ves., 55; *White v. Warner*, 2 Mer., 459; *Green v. Bridges*, 4 Simons, 96; *Gregory v. Wilson*, 9 Hare, 683, 689; *Wadman v. Calcraft*, 10 Vesey, 66; *Livingston v. Tompkins*, 4 Johns. Chy., 431; Smith's Man. Eq. (1st Am. ed.), 368.

Neglect or default may be wilful, though it may have been unintentional, and have arisen from forgetfulness: *Elliott v. Turner*, 13 Simons, 477; *Eaton v. Lyons*, 3 Ves., 692; *Rolf v. Harris*, 2 Price, 206; *Gregory v. Wilson*, 9 Hare, 689.

So the fact that the covenantor has employed others to perform the act is not a ground for relief if such agent has been negligent: *Nolkes v. Gibbon*, 3 Drewry, 681, 692; see also *Hill v. Harris*, 42 Georgia, 412.

Ordinarily a court of equity will not relieve a mortgagor from the operation of a condition in a mortgage, that upon failure to pay any part of the principal or interest the entire interest shall become due: *Valentine v. Van Wagener*, 37 Barb., 60, 23 How. Prac., 400; *Ferris v. Ferris*, 28 Barb., 29, 16 How. Pr., 102; *Dwight v. Webster*, 32 Barb., 47, 10 Abb. Prac., 128; *Thompson v. Hudson*, L. R., 4 H. L., 1; L. R., 6 Chy. App., 320, 2 Id., 255.

Otherwise if the mortgagee have been guilty of any trick or oppressive conduct: *Ferris v. Ferris*, 28 Barb., 29, 16 How. Prac., 103; *Western Bank v. Sherwood*, 29 Barb., 383; *Broderick v. Smith*, 26 Barb., 539, 15 How. Prac., 434.

If there be in fact a breach which, under the rules of equity will not be relieved from, the smallness of the damages is no ground for relief: *Atkins v. Kinnier*, 4 Excheq., 776, 783; *Hill v. Barclay*, 18 Ves., 63.

Nor is the hardship of the case.

In *De Scarlett v. Dennett*, 9 Modern, 22, Mr. Lutwyche argued for the plaintiff that it was hard for his client to lose his lease when he was willing to make compensation. The Master of the Rolls said: "It is owing to his covenant, and to a wilful, voluntary breach thereof, against which the court cannot relieve."

In *White v. Warner*, 2 Merivale, 459,

1875

Cole v. North Western Bank.

the complainant had expended £3,000 upon the premises.

In *Green v. Bridges*, 4 Simons, 96, the lessee had expended a large sum on the premises.

In *Elliott v. Turner*, 18 Simons, 477,

a large manufacturing business would be destroyed by the injunction.

In *Gregory v. Wilson*, 10 Eng. Law and Eq., 134, the complainant had expended £4,000 on the premises. In all these cases relief was refused.

[Law Reports, 10 Common Pleas, 354.]

Feb. 12, 1875.

[IN THE EXCHEQUER CHAMBER.]

354] *COLE and Another v. THE NORTH WESTERN BANK.¹

Factors Act—Agent “intrusted with the Possession of Goods,” within 5 & 6 Vict. c. 39—Agent a Broker and also a Warehouse-keeper, and Goods delivered to him in the latter Capacity.

A warehouse-keeper who has goods deposited with him as such is not “an agent intrusted with the possession” of them, within the *Factors Act*, 5 & 6 Vict. c. 39, although he be also a broker, and is usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal.

One Slee carried on the business of a sheep's wool broker in Liverpool, and also that of a warehouse-keeper. In his capacity of warehouse-keeper he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for sheep's wool and goats' wool to arrive in Liverpool, which when landed was deposited in his warehouses, under directions to send the plaintiffs a report and valuation, but he was not authorized to sell without specific instructions. The sheep's wool so deposited with him was usually sold by Slee, and the proceeds received by him for the plaintiffs. The goats' wool Slee never sold, he not being a goats' wool broker.

Having wools of the plaintiffs of both descriptions in his warehouse, but not having received any instructions as to the sale of either, Slee professed to pledge the whole with the defendants, bankers in Liverpool, by a letter in which he undertook to hold them as trustee for the defendants, to secure the sum advanced:

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that Slee was not, as to any of the wools so agreed to be pledged, “an agent intrusted with the possession,” within the *Factors Act*, 5 & 6 Vict. c. 39.

Per Blackburn, J.: The intention of the *Factors Act*, 5 & 6 Vict. c. 39, was, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges them, he should be deemed by that act to have misled any one who *bona fide* deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorized to sell the goods or to procure the advance.

Per Bramwell, B.: The statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed.

ERROR upon a judgment of the Court of Common Pleas for the plaintiffs on a special case: Law Rep., 9 C. P. 470; 10 Eng. Rep., 249.

Feb. 4. *Benjamin*, Q.C., (*R. G. Williams*, Q.C., and *Gorst*, with him), for the defendants, contended that an agent intrusted with the possession of goods, and having an

(1) Affirming 10 Eng. Rep., 249.

ostensible authority to deal *with them as owner, [355 might, even at common law, and independently of the Factors Acts, confer a good title upon a vendee or pledgee,—*Pickering v. Busk* ⁽¹⁾; that the fair inference from the facts stated in the special case was, that Slee was intrusted with the wools in question as a wool-broker, and not as a mere warehouse-keeper (the making of a valuation and report being no part of the duty of a warehouse-keeper), and, though his principals reserved to themselves the right to dispose of them themselves, still it was his usual course of business to sell the sheep's wool at all events and to receive the proceeds, and therefore he appeared to the world as the consignee and owner of the wools, notwithstanding any secret orders to await instructions as to the disposal of them; and that, at all events, he was an agent "intrusted with the possession" of the wools, within the Factors Acts, 5 & 6 Vict. c. 39; for, that, if one who ordinarily sells as agent is intrusted with the possession of goods for any purpose, he would have authority to pledge them, and his principals would be bound by his act. And, after an elaborate review, of the general policy of the earlier Factors Acts, 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94, and of the progressive changes from time to time effected in the law with regard to the relations between principal and factor, and a criticism of the various decisions which led to those changes, he submitted that the only inference that could reasonably be drawn from the statements in the case was, that Slee's position was such at the time of the pledge made by the letter of the 5th of April, 1872, as to make such pledge valid as against his principals, the plaintiffs. He referred to *Phillips v. Huth* ⁽²⁾; *Hatfield v. Phillips* ⁽³⁾; *Monk v. Whittenbury* ⁽⁴⁾; *Fuentes v. Montis* ⁽⁵⁾; *Baines v. Swainson* ⁽⁶⁾; *Lamb v. Attenborough* ⁽⁷⁾; *Navulshaw v. Brownrigg* ⁽⁸⁾; relying especially upon the judgment of Lord Westbury in the case of *Vickers v. Hertz* ⁽⁹⁾. As to the second point argued in the court below, viz., that, at the time of the pledge Slee had not *pos- [356 session of all the wools, *Langton v. Waring* ⁽¹⁰⁾ and *Portales v. Tetley* ⁽¹¹⁾ were cited.

Feb. 5. *Herschell*, Q. C. (*W. G. Harrison* with him), contra, contended that an agent had no authority at com-

⁽¹⁾ 15 East, 38.

⁽²⁾ 6 M. & W., 572.

⁽³⁾ 9 M. & W., 647; 12 Cl. & F., 343.

⁽⁴⁾ 2 B. & Ad., 484.

⁽⁵⁾ Law Rep., 3 C. P., 268; Law Rep., 4 C. P., 93.

⁽⁶⁾ 4 B. & S., 270; 32 L. J. (Q.B.), 281.

⁽⁷⁾ 1 B. & S., 831; 31 L. J. (Q.B.), 41.

⁽⁸⁾ 2 De G., M. & G., 441; 21 L. J. (Ch.), 908.

⁽⁹⁾ Law Rep., 2 H. L., Sc., 113.

⁽¹⁰⁾ 18 C. B. (N.S.), 315.

⁽¹¹⁾ Law Rep., 5 Eq., 140.

mon law to bind the property of his principal by a pledge; that the present case was neither within the mischief nor the words of the Factors Acts; that the defendants were not induced to advance the money upon the faith of Slee's possession or ostensible ownership of the goods, but acted upon his representation that he had them in his hands; that the fact of the wools having been deposited with Slee as a warehouseman did not give him authority under 5 & 6 Vict. c. 39 to bind his principals by a pledge of them; that, to give him such authority, it must appear that he was intrusted with the possession of the goods as agent for sale, or at least that it was the course of his business as such agent to sell; that the slightest inquiry on the part of the defendants would have disclosed the limited authority under which Slee held the wools; that the transaction of the 5th of April, 1872, did not amount to a pledge, but at the most to a mere contract or agreement to pledge, which might have been defeated by the principals getting back their goods before the transaction was complete; that the defendants could gain no title as against the plaintiffs by their wrongful act in forcibly possessing themselves of the wools in the manner disclosed by the case; that, as to the goats' wool, Slee was clearly never intrusted with them as broker at all; and that, as to the 114 bales of sheep's wool ex Grecian, they could not be the subject of a pledge by Slee, inasmuch as they were not in his hands at the time, and he did not profess to pledge the bills of lading, which were. He cited and commented upon the provisions of the Factors Acts, and also the following authorities, *Wilkinson v. King*(¹); *Pickering v. Busk*(²); *Monk v. Whittenbury*(³); *Baines v. Swainson*(⁴); *Fuentes v. Montis*(⁵); and contended that the dictum 357] of Lord Westbury in *Vickers v. Hertz*(⁶) was *founded upon a mistaken notion of the effect of the judgment of Willes, J., in the last mentioned case.

Benjamin, Q. C., in reply, referred to *Higsons v. Burton*(⁷).
Cur. adv. vult.

Feb. 12. BLACKBURN, J.: This is a special case on which the Court of Common Pleas gave judgment for the plaintiffs for the sum of £6,661 1s. 7d. The defendants brought error on that judgment, and the case was argued in the Exchequer Chamber on the 4th and 5th of February last, by Mr. Benjamin for the defendants (the plaintiffs in error) and Mr.

(¹) 2 Camp., 335.

(²) 15 East, 38.

(³) 2 B. & Ad., 484.

(⁴) 4 B. & S., 270; 32 L. J. (Q.B.), 281.

(⁵) Law Rep., 2 C. P., 268; 4 C. P., 93.

(⁶) Law Rep., 2 H. L., Sc., 113.

(⁷) 26 L. J. (Ex.), 342.

Herschell for the plaintiffs (the defendants in error), before my Brothers Bramwell, Mellor, Lush, Cleasby, Pollock, and Amphlett and myself, when we took time to consider.

The case was stated without pleadings. It did not as originally drawn give express power to the court to draw inferences of fact: but, on that being pointed out during the argument, it was agreed that it was so intended, and that, if necessary, an amendment should be made, to give that power.

The plaintiffs, merchants in London, were the owners of two parcels of sheep's wool, and two parcels of mohair or goats' wool. All four parcels were received for the plaintiffs by one Slee, a warehouseman and sheep's wool broker at Liverpool, and were by him deposited in his warehouse at Liverpool. From thence they were taken on the 13th of April, 1872, by the defendants, who claimed right so to do under a contract made by Slee on the 5th of April, 1872, by which he pledged, or agreed to pledge, the whole four parcels to the defendants for £7,000 then advanced to him by the defendants on that security.

At the time when this contract was made, the two parcels of goats' wool and one of the parcels of sheep's wool were in Slee's warehouse. The other parcel of sheep's wool was still on board the vessel (the Grecian) by which it had come: but Slee held the bill of lading, which had been sent to him by the plaintiffs to enable him to land and deposit the wool in his warehouse; and (after the making of the contract of the 5th of April) on the 9th of April this sheep's wool also was actually deposited in the warehouse.

*Slee absconded with the £7,000 thus obtained, and [358 then the defendants, having notice that Slee had committed this act of bankruptcy, but not having any further notice that he had not been so intrusted with the possession of the goods as to be able to pledge them, took forcible possession of the whole goods against the will of Slee's clerks.

The great question was whether Slee was, under the circumstances, so intrusted with the possession of the goods as to have been able on the 5th of April (supposing he had then delivered actual possession to the defendants) to make a pledge to the defendants good against the plaintiffs. As to this, there is a distinction between the sheep's wool and the goats' wool; for, Slee never sold goats' wool at all, and was clearly intrusted with the goats' wool as warehouseman, and as warehouseman only. But he did sell sheep's wool as a broker.

A broker, who, without being intrusted with the goods,

1875

Cole v. North Western Bank.

makes a contract between two principals, has no opportunity to pledge the goods at all. But we know (though it is not stated in the case) that brokers often are capitalists who make advances on the goods and have them transferred into their names as a security for such advances. And sometimes, especially where the principal is resident at a distance, the goods are transferred into the broker's name for the purpose of facilitating a sale by him, although there has been no advance made by him upon them. The agent thus intrusted is something more than a mere broker.

A pledge by a person thus intrusted with the possession of goods as broker would no doubt be good. And if, as is sometimes the case, the broker had warehouses of his own in which the goods so intrusted to him were stored, they would be equally in his possession as broker as if they had been stored in the warehouse of another in his name. But we are all agreed that we must understand from the statement in the case that Slee had not warehouses as merely ancillary to his business as broker, but that he carried on two distinct and independent businesses, the one being that of a warehouseman, the other that of a sheep's wool broker: and this raises the first question of fact, viz., whether the goods in question were intrusted to him merely as warehouseman, or also as broker.

359] *It is stated in the case that the bills of lading of the plaintiffs' wool (whether goats' wool or sheep's wool) were in the ordinary course of business sent down to Slee for the purpose of his receiving the wool from the ship and warehousing it. Slee, after the wool had been so received and warehoused, sent up a report and valuation thereon, and then awaited the plaintiffs' further instructions as to disposal. Two sample letters are set out in the Appendix, one relating to goats' wool, the other to sheep's wool; and they bear out the statement in the case that both kinds of wool were treated in exactly the same way.

But there is the further statement that, "as to the sheep's wool, Slee had no general authority from the plaintiffs to sell, but always awaited instructions, and acted only under specific authority given to him from time to time in each case; and, when such last-mentioned sales were effected, Slee received the proceeds."

We draw the inference of fact that, as between the plaintiffs and Slee, Slee was intrusted with the sheep's wool and goats' wool alike, solely for the purpose of warehousing them. But, as it appears that he was sometimes authorized by the plaintiffs to sell and receive payment for sheep's wool

deposited in his warehouse, the question arises whether he could make to the defendants a good pledge of any wool (either goats' wool and sheep's wool, or of sheep's wool only, or of neither), deposited by the plaintiffs in his warehouse, though not intended to be sold.

The Court of Common Pleas decided that the pledge (even supposing it to have been executed by delivery on the 5th of April) would not have been good either as to the sheep's wool or the goats' wool: and we are of opinion that they were right, and that their judgment should be affirmed.

This renders it unnecessary for us to express any opinion on two subsidiary points raised by Mr. Herschell,—first, that the taking forcible and (as he argued) wrongful possession on the 13th of April could not better the defendants' position, who therefore remained in the position (provided for in the 4th section of 5 & 6 Vict., c. 39) of a person who has made a contract for a pledge with an agent, but has not actually received the goods contracted to be pledged,—and, secondly, as to the parcel per Grecian, *that Snee on the 5th of [360 April, when the contract was made, was not in possession of these wools, though he had the bill of lading under which he subsequently obtained them. We merely mention these two points, to show that we have not overlooked them; but express no opinion on either.

The decision of this case depends, in our opinion, entirely on the true construction of the last of the Factors Acts, 5 & 6 Vict., c. 39, which was passed to amend and extend the earlier Factors Acts, 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94. We think, however, that, in order to understand 5 & 6 Vict., c. 39, it is necessary to consider what was the common law before any legislation on the subject, what were the provisions of the two earlier acts, and what had been the judicial decisions upon them.

The amount at stake in the present action is large, and renders our decision of importance to the parties. But the general importance of the question as regards the commerce of this country is even greater. It was for this reason, and not from any doubt as to what the decision should be, that the court took time to consider their judgment. And for the same reason we now proceed to give our reasons at some length.

The 4th edit. of Abbott on Shipping was published before the passing of either of the Factors Acts. The 5th edit., the last published in the lifetime of the author, was published before the passing of 5 & 6 Vict., c. 39: but it contains a

valuable abstract of the two earlier Factors Acts, indicating what Lord Tenterden thought was their effect. The passage containing his opinion has been suppressed in the sixth and subsequent editions of Abbott on Shipping. The 5th edition, in which alone it is to be found, is now out of print: it is worth while, therefore, to quote the whole passage at length: it will be found in part 3, ch. 9, s. 16, p. 381:

“Lastly, we are to consider by what acts the right of the consignor may be taken away before the end of the transit. Since the publication of the former editions of this book, this subject has received the attention of the Legislature, and acts of Parliament have passed⁽¹⁾ by which the matter will in many cases be governed in future. The legislative enactments are in part *confirmatory of the common law, and in part important alterations of it. The following abstract of them will, it is hoped, be found correct and useful.

“The person in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person, or received by such person to his use, if he has not notice by the bill of lading or otherwise, at or before the advance or receipt, that such person is not the actual and *bona fide* owner of the goods; and such person shall be taken for the purposes of the act to have been intrusted with the goods for the purpose of consignment or of sale, unless the contrary be made to appear⁽²⁾. So, also, a person intrusted with and in possession of a bill of lading, or of any of the warrants, certificates, or orders mentioned in the act, is to be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods or the deposit or pledge thereof, if the buyer, disponent, or pawnee has not notice, by the document or otherwise, that such person is not the actual and *bona fide* owner of the goods⁽³⁾. But, if such person deposit or pledge the goods as security for a pre-existing debt or demand, he who so takes the deposit or pledge without notice shall acquire such right, title, or interest, and no further or other, than was possessed by the person making the deposit or pledge⁽⁴⁾. And, further, any person may contract for the purchase of goods with any agent intrusted with the goods, or to whom they may be consigned, and receive and pay for the same to the agent, notwithstanding he

(1) 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94.

(3) 6 Geo. 4, c. 94, s. 2.

(2) 6 Geo. 4, c. 94, s. 1.

(4) 6 Geo. 4, c. 94, s. 3.

shall have notice that the party with whom he contracts is an agent, if such contract and payment be made in the ordinary and usual course of business, and he has not at the time of the contract or payment notice that the agent is not authorized to sell or to receive the price⁽¹⁾. Also, any person may accept any goods, or any such document as aforesaid, on deposit or pledge from any factor or agent, notwithstanding he shall have notice that the party is a factor or agent; but, in such case, he shall acquire such right, title, or interest, and no further *or other than [362 was possessed by the factor or agent at the time of the deposit or pledge⁽²⁾).

"It is, however, provided that the act shall not prevent the true owner of the goods from recovering them from his factor or agent before a sale, deposit, or pledge, or from the assignees of such factor or agent, in the event of his bankruptcy; nor from the buyer the price of the goods, subject to any right of set-off on the part of the buyer against the factor or agent; nor from recovering the goods deposited or pledged, upon repayment of the money or restoration of the negotiable instrument advanced on the security thereof to the factor or agent: and upon payment of such further money or restoration of such other negotiable instrument (if any) as may have been advanced by the factor or agent to the owner, or on payment of money equal to the amount of such instrument; nor from recovering from any person any balance remaining in his hands as the produce of a sale of the goods after deducting the money or negotiable instrument advanced on the security thereof. And, in the case of the bankruptcy of the factor or agent, the owner of the goods so pledged and redeemed shall be held to have discharged *pro tanto* his debt to the estate of the bankrupt⁽³⁾).

"I am not aware that any case has hitherto been decided upon the construction of these enactments. They appear, as I have before observed, to be partly a confirmation and partly an alteration of the law; and, as a knowledge of the former state of the law is often very useful, even after an alteration has been made, it has been thought advisable to retain the contents of the last edition on this subject, with a reference to some subsequent decisions."

We agree with Lord Tenterden in thinking that these acts were partly a confirmation and partly an alteration of the

(1) 6 Geo. 4, c. 94, s. 4.

(3) 6 Geo. 4, c. 94, s. 6.

(2) 6 Geo. 4, c. 94, s. 5.

law, and that, to understand them, it is necessary to see what the law was before they were passed.

At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title [363] defeasible on account of *fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited.

And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods *in transitu* had the same effect in defeating the unpaid vendor's right to stop *in transitu* that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained, had no greater effect at common law than the transfer of the actual possession.

Lord Tenterden thus states the law ("): "If the goods were sent to the consignee as a factor, it was thought that his possession of the bill of lading could not in reason give him any greater power over the goods before their arrival than his actual possession of them afterwards would do: and as, in the case of actual possession, although a factor might sell the goods and thereby bind his principal because his employment and authority are to sell, but could not pawn or pledge them because he is not by his employment authorized so to do, so, before the arrival of the goods, it was held that he could not divest the consignor's right to stop them by indorsing or delivering over the bill of lading as a pledge."

The proposition that a factor is not by his employment

(1) Abbott on Shipping, 5th ed., part 3, ch. 9, s. 19, p. 391.

authorized to pawn or pledge goods intrusted to him, was for many years much controverted in point of fact. But, it having once been decided as a matter of law that he was not so authorized, the courts adhered to what had been decided.

*The law in this respect has been altered by 5 & 6 [364 Vict. c. 39, as will be shown hereafter: but the Legislature did not alter it in the first Factors Act, 4 Geo. 4, c. 83, except in the case of consignments by sea. In *M^cCombie v. Davies* (1), the decision went so far as to hold that a pledge by a factor was so totally tortious as not even to transfer the lien which the pledgor himself had. This decision is made no longer law by the earlier Factors Acts.

The general principle of law, that, where the true owner has clothed any one with apparent authority to act as his agent, he is bound to those who deal with the apparent agent on the assumption that he really is an agent with that authority, to the same extent as if the apparent authority was real, is illustrated by two decisions which probably were present to the minds of those who framed 6 Geo. 4, c. 94. In *Wilkinson v. King* (2), it appeared that one Ellit was a wharfinger, and was accustomed to sell lead from his wharf. It is not distinctly stated in the report whether these sales were solely of his own lead or also of lead sent to him by others to sell as their factor; but, as it is expressly mentioned that he had never sold any lead for the plaintiff, it appears probable that he sold for others as factor. The defendant *bona fide* bought from Ellit lead belonging to the plaintiff which had been sent to him as wharfinger only. Lord Ellenborough ruled that "Ellit had no color of authority to sell the lead, and no one could derive title from such a tortious conversion." And several other cases depending on similar sales by Ellit were decided in 1809 and 1810 in the same way. In none of these does there appear to have been any attempt to review in banc the decisions at *nisi prius*. In *Pickering v. Busk* (3), in 1812, the plaintiff, the true owner, had purchased the goods through Swallow, who pursued the public business of broker and an agent for sale, and the goods were at the plaintiff's desire transferred into the name of Swallow. It was held that this proved that Swallow had an implied authority to sell, and consequently that the defendants were justified in buying of Swallow and paying him the price. Lord Ellenborough goes somewhat further. He says: "If a person authorized another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed *that [365

(1) 7 East, 5.

(2) 2 Camp., 335.

(3) 15 East, 38.

1875

Cole v. North Western Bank.

the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by his principals in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not." It is to be observed, however, that the other judges base their judgment on the ground that the circumstances proved in fact an implied authority to Swallow to sell; and that Lord Ellenborough limits his more extensive doctrine to the case of a person "authorizing another to assume the apparent right of disposing of property in the ordinary course of trade," or, in other words, intrusting it to an agent whose business it is to sell: and, on *Wilkinson v. King* (1) being cited on the argument, he says (2): "That was the case of a wharfinger whose proper business it was not to sell, and to whom the goods were sent for the mere purpose of custody:" from whence it may be inferred that he limited his general doctrine to cases in which, as in that before him, the goods were intrusted to an agent whose ordinary business it was to sell, in the course of his business as such agent, and because he was such agent. And Le Blanc, J., expressly says (3): "This is distinguishable from all the cases where goods are left in the custody of persons whose proper business it is not to sell."

Perhaps, however, the case of *Dyer v. Pearson* (4), which was decided in 1824, the year before the passing of 6 Geo. 4, c. 94, is that which throws most light on the intention of the Legislature. That was trover for wool. Smith, who had sold the wool to the defendant, had been intrusted by the plaintiffs with the bill of lading, for the purpose of warehousing the goods, which he did in his own name. There was no distinct evidence that Smith was in the habit of buying or selling wool for others; and this was relied on in the argument as distinguishing the case from *Pickering v. Busk* (5), which was not questioned; and it was not con-
366] tended *that he in fact had any authority from the plaintiffs to sell. Abbott, C.J., had at the trial left the question to the jury whether the defendant had purchased the wool under circumstances which would have induced a cautious man to believe that Smith had authority to sell.

(1) 2 Camp., 335.

(4) 3 B. & C., 38.

(2) 15 East, at p. 42.

(5) 15 East, 38.

(3) 15 East, at p. 45.

The jury found for the defendant. A new trial was granted; and Abbott, C.J., delivering the judgment of the court, says ('): "The general rule of the law of England is, that a man who has no authority to sell cannot by making a sale transfer the property to another. There is one exception to that rule, viz., the case of sales in market overt. Now, this being the rule of law, I ought either to have told the jury, that, even if there was an unsuspecting purchase by the defendant, yet, as Smith had no authority to sell, they should find their verdict for the plaintiffs, or I should have left it to the jury to say whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having, not the possession only, but the property; for, if the real owner of goods suffer another to have possession of his property and of those documents which are the *indicia* of property, then *perhaps* a sale by such a person would bind the true owner. That would be the most favorable way of putting the case for the defendant: and that question, *if it arises upon the evidence*, ought to have been submitted to the jury." The Legislature seem to have intended to declare the law in future on the two points on which in that judgment doubt was expressed, and which I have indicated by putting them in italics.

When we look at the language used in the two earlier Factors Acts with reference to this state of the law, it seems to us clear that the Legislature intended by 4 Geo. 4, c. 83, to alter the law in favor of consignees, so far as to enact that, where goods were shipped in the names of persons "intrusted for the purposes of sale" with goods, the consignees might advance money on the security of the goods as if the consignors were the true owners, unless they had notice to the contrary; with a proviso (which may have some bearing on the construction of s. 4, of 5 & 6 Vict. c. 39) that the persons in whose names such goods are so shipped shall be taken to have been intrusted therewith, unless the contrary "appear or be shown in evidence by any person disputing the *fact*." And by the 2d section of that [367 act, the legislature repealed *M'Combie v. Davies* (2) in so far as it was applicable to those taking pledges from consignees: but that act did not alter the established law as to pledging, with regard to others than consignors and consignees. The 8 Geo. 4, c. 94, s. 1, re-enacted the 1st section of 4 Geo. 4, c. 83.

We are not in the present case concerned with the rights of consignees, except in so far as the provisions respecting

(1) 3 B. & C., at p. 42.

(2) 7 East, 5.

1875

Cole v. North Western Bank.

them throw light on the other sections of the acts. The 2d section of 6 Geo. 4, c. 94, made an important alteration in the law, as by it the possession of bills of lading or other documents of title gave a power of selling or pledging the goods to those dealing *bona fide* with the possessor, beyond any which either by common law or by any provision of that statute the possession of the goods themselves gave. This solved one of the doubts expressed in *Dyer v. Pearson* (1), by enacting that the possession of the documents of title might enable the person so possessed to deal with others as if he were the owner of the goods. It was confined, however, to the possession by "persons intrusted with" these documents of title; on which words a construction was put by the courts in the two cases of *Phillips v. Huth* (2) and *Hatfield v. Phillips* (3).

The 5 & 6 Vict. c. 39, in consequence of these decisions, altered the law as to what should constitute intrusting. The 2d section of 6 Geo. 4, c. 94, also contained a proviso that the purchaser or pledgee had not notice, by the documents or otherwise, that the seller or pledgor was not "the actual and *bona fide*" owner of the goods sold or pledged,—a proviso which, especially after the decision of *Fletcher v. Heath* (4), rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only. This also has been altered by 5 & 6 Vict. c. 39. But, in the 4th section of 6 Geo. 4, c. 94, the language used by the Legislature is completely changed. It does not in this section give any power to pledge at all; nor does it use the language of the 2d section, and authorize "any person 368] *intrusted with the possession of the goods" to sell them to any one not having notice that this person is not the true owner: but it enacts that it shall be lawful to contract with "any agent" intrusted with any goods, or to whom they may be consigned, for the purchase of such goods, and to pay for the same to "such agent;" and such sale and payment is to be good, notwithstanding the purchaser has notice that the party selling or receiving payment is only an agent; provided such contract or payment is made in the usual course of business,—a proviso which by itself alone shows that the Legislature meant by the word "agent" only such agents as in the usual course of business sell goods for their principals and receive payments, such as factors, brokers, &c., and did not mean to include bailees, warehousemen, carriers, and others who may in one sense no doubt be called

(1) 3 B. & C., 38.

(2) 6 M. & W., 572.

(3) 9 M. & W., 647; 12 Cl. & F., 343.

(4) 7 B. & C., 517.

agents, but who do not sell or receive payment for goods intrusted to them by those employing them. It therefore solves the second doubt in *Dyer v. Pearson* (¹), by declaring that, if the evidence should be such as to show that the person in possession of the goods was intrusted as "an agent," a sale by him should bind the true owner.

Then follows a further proviso, that the person dealing with the agent has not notice that the agent is not authorized to sell or receive payment. This latter proviso shows that the framer of the act remembered that a factor might, as between him and his principal, be restrained from selling except on particular terms, or possibly forbidden to sell at all, and yet that the sale on the usual terms, though in contravention of those secret instructions, would be good as regards those who had not notice of this restriction, but bad as regards those who had.

It seems to us, therefore, that the Legislature by this section intended to confirm (to use Lord Tenterden's expression) the common law as laid down in *Pickering v. Busk* (²), but did not mean to extend it to all cases in which any person is intrusted with the custody of goods, though that person may in one sense be an agent for the intruster. And it seems to us that, on the construction of the act, and without reference to authority, it must be intended to apply only to cases in which the intrusting is in the *course of that kind [369 of agency, so as to create the relation of principal and-agent between the intruster and the intrusted. In effect, that the decision in *Wilkinson v. King* (³) was not overruled or shaken in *Pickering v. Busk* (²), and was not intended to be affected by the Legislature. For example, if a furnished house be let to one who carries on the business of an auctioneer, he is intrusted as tenant with the furniture, being in fact an auctioneer: but it never was the common law, and could not be intended to be enacted, that, if he carried the furniture to his auction room and there sold it, he could confer any better title on the purchaser than if he had as auctioneer acted for some other tenant who committed a similar larceny, as a fraudulent bailee: nor, to come nearer to the present case, that a warehouseman or wharfinger who as such is intrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by the sale of the goods than he could if they had been intrusted to some other warehouseman who employed him to sell.

This was the construction put upon the act in *Monk v.*

(¹) 3 B. & C., 38.

(²) 15 East, 38.

(³) 2 Camp., 335.

1875

Cole v. North Western Bank.

Whittenbury ⁽¹⁾, decided in 1831; and that decision has never been questioned. That decision was before 5 & 6 Vict. c. 39: and the Legislature might easily have altered the enactments, if they had been so minded, so as to avoid the effect of that decision, as they did alter them so as to avoid the effect of other decisions.

The 5 & 6 Vict. c. 39, commences with a preamble; and though, of course, the enacting part may either go farther than or fall short of effecting what is recited in that preamble as being the object of the Legislature, that preamble is of great importance. It first recites that, under 6 Geo. 4, c. 94, "and the present state of the law, advances cannot safely be made upon goods or documents of title to persons known to have possession as agents only." This points to *Fletcher v. Heath* ⁽²⁾, and shows an intention to alter the law as there decided. It then recites that "advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, 370] and that the same protection and validity should *be extended to *bona fide* advances upon goods and merchandise as by the said recited act is given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances *bona fide* made on the security thereof."

This recital shows a plain intention to enact that what had, ever since the case of *Paterson v. Tash* ⁽³⁾, been the law, should no longer be so; and that an agent having power to sell should be also enabled to pledge. But there is no indication of any intention to give a power to pledge where there is not power to sell; nor to extend the power to sell beyond that which by the common law and 6 Geo. 4, c. 94, s. 4, was given; nor to alter the construction put upon that enactment by the decision in *Monk v. Whittenbury* ⁽⁴⁾.

There is a further recital, that the act does not extend to protect exchanges of securities *bona fide* made. This refers to *Taylor v. Kymer* ⁽⁵⁾ and perhaps *Bonzi v. Stewart* ⁽⁶⁾, though that latter case (after very protracted litigation) was not decided till a few weeks before 5 & 6 Vict. c. 39 received

⁽¹⁾ 2 B. & Ad., 484.

⁽⁴⁾ 3 B. & Ad., 320.

⁽²⁾ 7 B. & C., 517.

⁽⁵⁾ 4 M. & G., 295.

⁽³⁾ 2 Str., 1178.

the royal assent, and this recital shows an intention to alter the law as there decided.

There is no express recital pointing to the decision in *Phillips v. Huth* ⁽¹⁾, and the case of *Hatfield v. Phillips* ⁽²⁾, which had then been decided in the Exchequer Chamber and was still pending in the House of Lords; but, from the enactment in the 4th section, it is plain that these cases were in contemplation, and that it was intended to alter the law as laid down in those cases.

The Legislature then proceed in the first section to enact that "any agent" who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, may pledge the same. The Legislature, it is to be observed, does not use the words "person intrusted," which are those used in the 2d section of 6 Geo. 4, c. 94, but "agent intrusted," being the words used in the 4th section of the [371] act, on which words a judicial construction had been put in *Monk v. Whittenbury* ⁽³⁾.

The 2d section alters the law as declared in *Taylor v. Kymer* ⁽⁴⁾. The 4th section alters the law as laid down in *Phillips v. Huth* ⁽¹⁾, by enacting "that any agent intrusted as aforesaid and in possession of any such documents of title, whether derived immediately from the owner of such goods or obtained by reason of such agent's having been intrusted with the possession of the goods or of any other document of title, shall be deemed and taken to be intrusted with the possession of the goods:" . . . "and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence." It is not necessary to notice any other parts of the act.

Mr. Benjamin argued that the object of the Legislature was to afford facilities for safely making advances; and that this object was only imperfectly carried out if an advance made under such circumstances as the present was not protected. He argued that the defendants had no means of knowing whether Slee was possessed as a warehouseman or as a broker. As far as regards the mohair, this argument fails in fact; for, a very little inquiry would have made the defendants aware that Slee was not a broker for mohair at all. As regards the sheep's wool, however, there is force in the argument that the defendants might, without much negligence, be led by Slee to believe that he was intrusted with

⁽¹⁾ 6 M. & W., 572.

⁽²⁾ 9 M. & W., 647; 12 Cl. & F., 343.

⁽³⁾ 2 B. & Ad., 484.

⁽⁴⁾ 3 B. & Ad., 320.

the sheep's wool as a broker. But, if the plaintiffs knew that the warehouseman whom they trusted was also a wool-broker, the defendants were aware that the wool broker whom they trusted was also a warehouseman; and there seems no reason why without inquiry they should think he was intrusted in one capacity rather than the other.

Probably 5 & 6 Vict. c. 39, s. 4, requires us to treat him as being so intrusted, unless the contrary is shown in evidence. But we are all of opinion that in this case the plaintiffs have shown in evidence that Slee was not intrusted as broker, but 372] *solely as warehouseman. We do not think that the Legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt. If such had been their object, it could easily have been so enacted in terms; which certainly has not been done.

The general rule of law is, that, where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The Legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who *bona fide* deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance. And we think that, if this was the intention, it is carried out by the enactments. We do not think that it was wished to make the owner of goods lose his property if he trusted the possession to a person who in some other capacity made sales, in case that person sold them. If such was the wish of those who framed the act, we think they have not used language sufficient to express an intention so to enact.

Hitherto we have been considering the statute 5 & 6 Vict. c. 39 as if we had to construe its language for the first time, without the assistance of any decided cases. We think, however, that every case that has been decided since the passing of the statute confirms our view. In *Wood v. Rowcliffe* ⁽¹⁾, Wigram, V.C., held that a person intrusted to keep in her own house furniture belonging to the plaintiff, though in one sense an agent for the owner, was not an agent within the meaning of the act, and consequently could not make a good pledge. In *Lamb v. Attenborough* ⁽²⁾, it was held that a clerk, who as such was possessed of delivery-

⁽¹⁾ 6 Hare, 183.

⁽²⁾ 1 B. & S., 831; 31 L. J. (Q.B.), 41.

orders, was not an agent intrusted within the meaning of the Act, and could not make a good pledge. In *Heyman v. Flewker* (¹), Willes, J.; in delivering judgment, says that what the cases decide *² "may be stated [373 thus,—that the term 'agent' does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody, or otherwise as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the act has taken its name." So, it has been repeatedly decided that a sale or pledge of a delivery-order or other document of title (not being a bill of lading) by the vendee does not defeat the unpaid vendor's rights, because the vendee is not intrusted as an agent: *Jenkyns v. Osborne* (³); *M'Ewen v. Smith* (⁴). And it may be observed that, in many of such cases, in which money has been advanced to the buyer on the faith of the document of title, the buyer must have been a person who carried on business as a commission-merchant: yet it never seems to have occurred to any one that that fact made any difference. So, it has been repeatedly held that, where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick), a purchaser or pledgee acquires no title, for, the trickster is not "an agent intrusted" with the possession: *Kingsford v. Merry* (⁵); *Hardman v. Booth* (⁶).

Quite consistently with these latter decisions it was held, first by the Exchequer, on demurrer, in *Sheppard v. Union Bank of London* (⁷), and afterwards by the Court of Queen's Bench, on the facts, in *Baines v. Swainson* (⁸), that, if the true owner did in fact intrust the agent as an agent, though he was induced to do so by fraud, a pledge by the agent would be good.

In *Fuentes v. Montis* (⁹) it was decided, first by the Common Pleas, and afterwards by the Exchequer Chamber, that, after the true owner had demanded back his goods from the factor, who wrongfully refused to give them up, the factor ceased to be "intrusted," and a pledge subsequently made by him was not good. In delivering judgment, Willes, J., speaks of *Baines v. Swainson* (⁸) *as [374

(¹) 13 C. B. (N.S.), 519; 32 L. J. (C.P.), 132.

(²) 7 M. & G., 678.

(³) 2 H. L. C., 309.

(⁴) 1 H. & N., 503; 26 L. J. (Ex.), 83.

(⁵) 1 H. & C., 803; 22 L. J. (Ex.), 105.

(⁶) 7 H. & N., 661; 31 L. J. (Ex.), 154.

(⁷) 4 B. & S., 270; 32 L. J. (Q.B.), 281.

(⁸) Law Rep., 3 C. P., 268; Law Rep.,

4 C. P., 98.

1878

Cole v. North Western Bank.

going to the extreme of the law, but does not express dissent from it.

Against this great mass of authority, Mr. Benjamin could produce nothing but some observations of Lord Westbury in *Vickers v. Hertz* ⁽¹⁾; but we think, when those are rightly understood, they are not in conflict with the other decisions. The facts in *Vickers v. Hertz* ⁽¹⁾ bear a very close resemblance to those in *Baines v. Swainson* ⁽²⁾. Campbell, who was a Glasgow broker, had represented to Vickers that he had made for him a sale to a principal of a large quantity of iron. This, it seems, was a falsehood. Vickers was induced by the falsehood to send a delivery-order to Campbell. He did not intrust him with the delivery-order with a view to his making a sale, for he thought it was already made; but he did intrust him in the course of his business as agent with the document of title, that he might as such agent deliver the goods. The decision of the House of Lords was, that a pledge by Campbell was good under the Factors Acts. Lord Westbury seems to have understood Willes, J., in *Fuentes v. Montis* ⁽³⁾, as expressing an opinion that the act did not embrace the case of any but a factor who was intrusted for the purpose of effecting a sale not yet made. Had Willes, J., expressed such an opinion, it would, no doubt, have been inconsistent with *Baines v. Swainson* ⁽²⁾, and been overruled by the House of Lords in *Vickers v. Hertz* ⁽¹⁾. We think, however, that he expressed no such opinion, and, consequently, that all the authorities are in unison with the decision of the Common Pleas in this case, which we therefore affirm.

BRAMWELL, B.: I find as a fact in this case that Slee was in possession of this wool only as a warehouseman. He certainly was in possession of the goats' wool in that and in no other character. He got and kept possession of the sheep's wool just in the same way as he did of the goats'; and, though he usually sold the sheep's wool, it was under specific instructions; he had no general authority to do so; he acted under specific instructions. I infer that, as he did it *usually*, [375] he did not do it always, and that there *was nothing in the dealings between the parties to prevent the plaintiffs from having the sheep's wool sent to London, or employing somebody else to sell it. Moreover, his possession of the sheep's wool was not necessary to his selling it as a broker, nor, I suppose, a thing ordinarily the case with sheep's wool brokers; nothing of the sort is stated. His possession

⁽¹⁾ Law Rep., 2 H. L., Sc., 113.

⁽³⁾ Law Rep., 3 C. P., at p. 284.

⁽²⁾ 4 B. & S., 270; 32 L. J. (Q.B.), 281.

of both classes of wool was accounted for in the same way, unconnected with his being a broker, viz., by Liverpool being the port of landing, his having warehouses there, and being employed to land the wool and warehouse it in his own warehouses. I may add, though it is not material, that it does not appear that the defendants knew he had the wool nor the documents of title for it. Indeed, as to the Grecian's parcel, they could not know it.

These being the facts, as I view and find them, was he an agent intrusted with the possession of goods within the meaning of 5 & 6 Vict. c. 39, s. 1? The argument is that he is an agent, and that he is intrusted with the possession of the goods. But, unless we adopt a verbal construction that leads to absurdities, some limitations must be put on these words; some such limitation as "agent intrusted as such, and ordinarily having as such agent a power of sale or pledge;" otherwise, the words would include the case of an agent for the sale of one thing, say, a metal-broker intrusted with a thing unconnected with his agency, say, wool; and also the case of an agent for some purpose which neither in fact gave him power to sell or pledge, nor according to the usage of business appeared to give such power. For instance, a packer intrusted with goods, though known to be a packer by the lender of money, might pledge the goods to such lender. So a carrier, who is an agent to deliver goods from A. to B., would have power to pledge to C., who knew he was a carrier only, and as such only had possession. Because the conclusion of s. 1 protects the transaction, though the pledgee "may have had notice that the person is only an agent." But, only an agent in what sense? Surely only an agent such as the pledgee might well suppose had power to pledge. This clause and this part of it being intended to protect persons who deal with agents known to be such, who in reason may pledge because they usually make advances to those who have intrusted them with the goods. It may be said that these difficulties are met by the *provision [376 that the transaction must be *bona fide* in the man advancing the money. But the answer is not sufficient. He might *bona fide* believe in a special authority or right to pledge, where there was none at all.

It seems to me, speaking generally, that the statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed. That is not the case here. In the first place, as I have observed, the possession of the wool was not necessary.

1875

Cole v. North Western Bank.

to Slee's acting as broker in relation to it. But, in the next place, Slee filled two characters. If the defendants chose to trust him as the possessor of goods, without inquiring in which character he possessed them, they cannot get a title on the ground that he was in possession in fact, when he was not in possession as agent nor intrusted as such.

When I look at the terms of Slee's note to the defendants, I doubt if the defendants trusted him on account of his possession of the wool, or knew of it. The *decisions* are, in my judgment, uniform in favor of this view.

The cases are so fully considered by my Brother Blackburn, that I think it needless to go into them. I am of opinion judgment should be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Clarke, Son & Rawlins.*

Attorneys for defendants: *Chester, Urquhart Bushby & Mayhew, for Laces, Banner & Co., Liverpool.*

CASES
 DETERMINED BY THE
COURT OF COMMON PLEAS,
 AND BY THE
COURT OF EXCHEQUER CHAMBER
 ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,
 IN AND AFTER
EASTER TERM, XXXVIII VICTORIA.

[Law Reports, 10 Common Pleas, 377.]

Jan. 15, 1875.

*SANDILL V. FRANKLIN.

[377]

Landlord and Tenant—Tenancy from Year to Year—Notice to Quit—Commencement of Tenancy.

A written agreement for the letting of certain premises expressed the tenancy to be "for a year certain, and so on from year to year until a half-year's notice should be given by or to either party, at a yearly rent of £50 payable quarterly, the first payment to be on the 25th of March next." The agreement was dated the 20th of December, 1872, and specified no date for the commencement of the term:

Held, that a notice to quit given by the landlord on the 24th of June, 1874, was a good notice.

EJECTMENT by landlord against tenant.

The trial took place before Denman, J., at the sittings in Middlesex after Hilary Term, when the facts were as follows:

The tenancy was under a written agreement dated the 20th of December, 1872, and no date was specified for the commencement of the term, but it was expressed to be for a year certain, and so on from year to year, until a half-year's notice to quit should be given by or to either party, at a yearly rent of £50, to be paid quarterly, the first payment [378 to be on the 25th of March next. The landlord had given notice to quit on the 24th of June, 1874. On these facts a verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a verdict for the defendant on the ground that the notice was bad.

1875

Worthington v. Jeffries.

Gibbons moved in pursuance of the leave. No date being fixed for the commencement of the term, the legal presumption is that it was to commence from the date of the agreement, viz., the 20th of December; if so, the notice ought to have been given on the 20th of June: *Doe v. Matthews* (').

LORD COLEBRIDGE, C.J.: I think there should be no rule. But for the provision as to the date of the payment of the first quarter's rent, I think Mr. Gibbons' contention might have been sound. I think that provision is a clear indication that the parties meant that the tenancy should be considered as commencing from the usual quarter-day, i.e., the 25th of December.

BRETT, J., concurred.

ARCHIBALD, J.: I am of the same opinion. In the absence of anything to lead to a contrary conclusion the date of the agreement might be presumed to be the commencement of the tenancy, but I think, looking to the fact that the first quarter was to end on the 25th of March, the parties intended the tenancy to be from the regular quarter-day.

HUDDLESTON, J., concurred.

Rule refused.

Attorney for defendant: *S. T. Cooper.*

[Law Reports, 10 Common Pleas, 379.]

April 21, 1875.

379]

*WORTHINGTON V. JEFFRIES.

Prohibition—Mayor's Court—Right to a Declaration in Prohibition—Discretion.

When a superior court is clearly of opinion, both with reference to the facts and the law, that an inferior court is exceeding its jurisdiction, it is bound to grant a writ of prohibition; whether the applicant for the prohibition is the defendant below or a stranger. In such a case, neither the smallness of the claim in the suit below nor delay on the part of the applicant is a reason for refusing the writ. The plaintiff in the inferior court has in no case an absolute right to have the plaintiff in prohibition put to declare in prohibition.

THIS was an application for a writ of prohibition to the Mayor's Court. A rule *nisi* having been obtained, *Grantham* showed cause.

Wightman Wood supported the rule.

The facts, arguments, and authorities cited fully appear from the judgment.

Cur. adv. vult.

(') 11 C. B., 675.

April 21. The judgment of the court (Brett, Grove, and Denman, JJ. (')), was delivered by

BRETT, J.: In this case, Mr. Wood, moving on the instructions of the defendant's attorney, as a stranger to the suit, obtained a rule calling on the plaintiff to show cause why a writ of prohibition should not issue to the Mayor's Court of the city of London. It appeared from the affidavits in support of the motion, which were not contradicted when cause was shown, that the action was brought to recover £11, the price of beer sold and delivered; that the plaintiff was a brewer at Burton-on-Trent; that the order was given in the city of London, but that the beer sent from Burton was delivered at the defendant's place of business in Covent Garden. Mr. Grantham showed cause. He did not deny that, according to previous decisions of this court, the writ might issue; but he submitted that the court had a discretion to refuse the writ on the ground that the amount sought to be recovered was too small to justify interference; and that he, *desiring to question the former decisions of this [380] court, had a right, if the court inclined to the prohibition, to an order from the court that the plaintiff in prohibition should declare in prohibition. In consequence of the great number of applications to this court for prohibition to the Mayor's Court in small suits, both points seemed to us to require consideration. It is agreed by all, that upon an application to any of the superior courts for a prohibition the court has a discretion in some cases to refuse to prohibit. Whether the application be by the defendant in the suit below, or the plaintiff, or a stranger, if the court doubt as to what is the true state of facts, or as to the law applicable to recognized facts, it is indisputable that the court may decline to proceed further, may refuse to prohibit or direct the plaintiff in prohibition to declare. It is also agreed that, if the defendant in an inferior court makes it clear to a superior court both in fact and law that the inferior court is proceeding without or beyond jurisdiction, the superior court is judicially bound *ex debito justitiæ* to issue a writ of prohibition. In such a case, when the defendant below is the applicant for prohibition, it is admitted that the superior court has no discretion to refuse to prohibit on the ground that the amount in dispute is small, or that the application is made late, or on any similar ground. The first point, therefore, now urged is, as Mr. Grantham when pressed admitted, that, although the court is clear both as to the facts

(') Keating, J., had retired at the end of Hilary Term, but concurred in the judgment.

and the law that the inferior court is acting without jurisdiction, that the cause below therefore is *coram non judice*, so that if the defendant below were the informant of the superior court it would be bound to issue the writ of prohibition, yet, if a stranger be the informant, the court may refuse the prohibition on the ground that the matter in dispute is small, or that the application is, in the opinion of the court, too late, or on some similar ground. The second point, in like manner, is that, although the court is clear both with regard to the facts and the law that the inferior court is acting without jurisdiction, and although the proposed decision of the court has upon precisely similar facts been approved of in the House of Lords in a former prohibition suit, yet, if the court be about to prohibit, the defendant in prohibition has a right to an order of the court [381] to the plaintiff in prohibition calling upon him *to declare in prohibition. And for this the high authority of Lord Mansfield is cited.

In order to determine both points, it seems to us advisable to draw attention again to the origin and reason of the writ of prohibition, and to the history of the procedures by which it has at different times been enforced: "As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the Crown that these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed, which issues out of the superior courts of common law to restrain inferior courts" (Bacon's Abridgment, Prohibition, quoting Rolle's Abridgment). "The object of prohibition in general is the preservation of the right of the King's crown and courts, and the ease and quiet of the subject" (Ibid). "The King may sue for a prohibition, though the plea in the spiritual court be between two common persons, because the writ is in derogation of his crown and dignity" (Ibid. C.) "It is *contra coronam et dignitatem regiam* for any to usurp to deal in that which they have not lawful warrant from the Crown to deal in, or to take from the temporal jurisdiction that which belonged to it. The prohibitions do not import that the ecclesiastical courts are *aliud* than the King's or not the King's courts, but do import that the cause is drawn into *aliud examen* than it ought to be, and therefore it is always said in the prohibitions (be the court temporal or ecclesiastical, to which it is awarded), if they deal in any case of

which they have not power to hold plea, that the cause is drawn *ad aliud examen* than it ought to be, and therefore *contra coronam et dignitatem regiam*" (2d answer in *Articuli cleri*, 2d Inst. 602). "None may pursue in the Ecclesiastical Court for that which the King's court ought to hold plea of, but upon information thereof given to the King's court, either by the plaintiff or by any mere stranger, they are to be prohibited, because they deal in that which appertaineth not to their jurisdiction" (Ibid. 10th answer).

And in the judgment of Willes, J., in *Cox v. Mayor of London* (¹), *which seemed to exhaust all learning [382 and ingenuity upon the questions of prohibition, this point is thus treated: "All lawful jurisdiction is derived from and must be traced to the royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorized is an usurpation of the prerogative and a resort to force unwarranted by law. Upon both grounds, viz., the infringement of the prerogative and the unauthorized proceeding against the individual, "prohibitions by law are to be granted at any time to restrain a court to intermeddle with or execute anything which by law they ought not to hold plea of. And they are much mistaken that maintain the contrary." These authorities show that the ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all. If this be so, on what principle can there be any distinction in the action of the superior court dependent upon the means by which, or the persons by whom it is informed of the breach of order, which is a breach of the prerogative? If it is the absolute duty of the superior court to enforce order on being convinced of a breach of it by information given by the defendant in the suit below, why should it be a less absolute duty if it is convinced of the same breach of order by information given by a stranger? Order is no less broken, the prerogative is no less invaded! And if the smallness of the matter in dispute is to be a ground for non-interference, still more if delay in application for the writ of prohibition is to be a ground, they would seem to be stronger grounds if the defendant is to be treated as the party whose interest is to be protected, than if the interference is to be based only on the necessity of preserving administrative regularity or

(¹) Law Rep., 2 H. L., 239 at p. 254.

1875

Worthington v. Jeffries.

order. Assume that the defendant in the suit is in the wrong, there may be no damage in fact to him by the declaration of his liability being made by one court rather than by another. It is true that there may be, as by his being cited to a distance, or into a court of more expensive procedure. But these difficulties may exist, although the court has jurisdiction. It follows from this view, also, that 383] *the real ground of the interference by prohibition is not that the defendant below is individually damaged, but that the cause is drawn in *aliud examen*, that public order in administration of law is broken. And inasmuch as the duty of enforcing such order is imposed on the superior courts, and the issue of a writ of prohibition is the means given to them by law of enforcing such order, it seems to us that, upon principle and in the absence of enactment, it must be their duty to issue such writ whenever they are clearly convinced by legal evidence, by whomsoever brought before them, that an inferior court is acting without jurisdiction, or is exceeding its jurisdiction. And thus in the third answer in the case of the "*Articuli cleri*," the duty is declared in absolute terms applicable to all cases: "Prohibitions by law *are to be* granted at any time to restrain a court to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary." And in *Wadsworth v. Queen of Spain* ('): "Therefore this court, vested with the power of preventing all inferior courts from exceeding their jurisdiction to the prejudice of the Queen or her subjects, *is bound to interfere* when duly informed of such an excess of jurisdiction." And again, "The garnishee at all events is a 'stranger' on whose information and complaint of the excess of jurisdiction in contempt of the Crown, we *shall be bound to correct* it by prohibition" (p. 217).

It is true that there is in *Forster v. Berridge* (') a most weighty and formidable *dictum* in favor of the alleged distinction between information brought forward by a stranger and by the defendant in the suit below. But, after anxious consideration, we are led to doubt whether the exact point, as now laid before us, was presented to the minds of the judges in that case. We doubt whether the point was presented to the minds of the judges, that they could refuse to prohibit, if both on the facts and the law they were clear that an inferior court was acting without jurisdiction. In that case it is obvious that there was that uncertainty as to

(') Law Rep., 17 Q. B., 171; 20 L. J. (Q. B.), 488.

(') 4 B. & S., 187; 32 L. J. (Q. B.), 312.

the law which has always been held to be a justification to a court to refuse to prohibit or to direct a declaration in prohibition. On the first point, therefore, we are of opinion that, whether *the superior court be informed by the [384 defendant or the plaintiff in the suit in the court below, or by a stranger, the only discretion which the superior court has to refuse a prohibition is, if it doubt in fact or law whether the inferior court is exceeding its jurisdiction, or is acting without jurisdiction; but if the superior court is clear in fact and in law that the inferior court is acting in excess of its jurisdiction, or without jurisdiction, it cannot rightly refuse to enforce public order in the administration of the law by refusing either to issue a writ of prohibition or to put the plaintiff in prohibition to declare in prohibition.

As to the second point, it is probable that in the beginning a writ of prohibition issued on mere verbal information given to a superior court of common law that an inferior temporal court or the Ecclesiastical Court was its jurisdiction. However that may be, it seems clear that it was granted on a surmise or suggestion made without oath. By stat. 2 & 3 Ed. 6, c. 13, s. 14: "If any party, for any matter or cause do sue for a prohibition," &c., "he shall, before it be granted," &c., "bring the very true copy of the libel, and under it shall be written the suggestion; and in case the said suggestion be not proved true within six months next following after the said prohibition shall be granted and awarded," &c. Here the proof of the truth of the suggestion comes after the issue of the writ granted upon the suggestion. So in the 8th complaint in *Articuli cleri*: "Furthermore the prohibition is quick and speedy, for it is ordinarily granted out of court by any one of the judges in his Chambers, whereas the consultation is very slowly and hardly obtained, not without oftentimes costly motions in open court, pleadings, demurrers, and sundry judicial hearings of both parties," &c. And the 28th answer: "Neither may the prohibition be denied upon the surmise made that the matter pursued in the Ecclesiastical Court is of temporal cognizance, but as soon as that shall appear unto us judicially to be false, we grant the consultation." These seem to show a practice to issue the writ upon a suggestion or surmise sufficient on the face of it, as a writ of mandamus is now issued, with power afterwards to set it aside on sufficient cause shown. This latter might be done by satisfying the court at once on affidavit, or by inducing the court to put the plaintiff in prohibition to declare in prohibition. *This practice is [385 obviously inconsistent with a suggested right on the part of

the defendant in prohibition to an order that the plaintiff in prohibition should declare in prohibition before the issue of the writ of prohibition. There is no trace of such a right in any book, and yet, if it had existed, it is impossible to suppose that a wealthy hierarchy, fighting desperately for privileges, would not have exercised it; for by continually forcing every plaintiff in prohibition into a contested lawsuit a wealthy court would inevitably in the end establish its jurisdiction. The absence of any instance of the exercise of the suggested right is the strongest evidence against its existence. It seems, next, not difficult to understand how the practice may have altered, and how, instead of issuing the writ at once, and then inquiring whether it should stand, the court, in case of doubt, should require the plaintiff in prohibition to declare in prohibition, and so the court should ascertain beyond doubt the facts or the law before issuing the writ. The courts would thus, in legal phraseology, inform their conscience before, instead of after, resolving to prohibit. This proceeding, it is said, is in the nature of an issue to inform the conscience of the court (Bacon's Abridgment, Prohibition, F. 579). That this came to be the procedure is evidenced by stat. 1 Wm. 4, c. 21, s. 1, which, reciting that the filing a suggestion on application for a writ of prohibition is productive of unnecessary expense, and the allegation of contempt in a declaration of prohibition filed before writ issued is an unnecessary form, &c., enacts "that it shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not as heretofore on behalf of the party and His Majesty, and without alleging the delivery of a writ or any contempt," &c. The new practice, then, being inaugurated and adopted, the question is, whether the suggested right has been introduced with it. The declaration in prohibition is for the purpose of informing the conscience of the court, that is to say, of making the court clear upon consideration as to facts, or law, or both. But if the court is already clear, why should 386] it inquire further? Assume the *question to be one of law, and the court to be clear as to the law, the very point by admission having been previously decided by the House of Lords, can it be that the court is bound on request to order the same question to be raised on demurrer, and to hear the question again and again solemnly argued, when it must be bound by authority to decide it always in one way? And

yet this is the state of things suggested to be according to law. But then we have to deal with the formidable statement of Lord Mansfield in the case of *St. John's College v. Teddington* ⁽¹⁾: "When the court is clearly of opinion that there is sufficient ground for a prohibition, the defendant has a right to put the plaintiff to declare, that his jurisdiction may not be taken from him in a summary way where no writ of error will lie." It is curious, however, to find that in the Index to 1 Burr., in which is a statement equivalent to that which in more modern reports is called the head-note of the case, the phrase used by him who reported the judgment is that the defendant in prohibition has "perhaps" a right to demand it, i. e., a declaration by the plaintiff in prohibition when the opinion of the court is against him. And in the report in 1 W. Bl. 81, of the same case, the phrase attributed to Lord Mansfield in the judgment is "a sort of right." The same phrase of "a sort of right" is adopted in Buller's *Nisi Prius*, and so in *Remington v. Dalby* ⁽²⁾, where it was insisted that the party opposing the rule was entitled to insist upon the opposite party declaring in prohibition, in order that the question might be placed on the record, Lord Denman is stated to have acceded in terms. But in the report of the case in 14 L. J. (Q.B.) 6, he is made to use the phrase "a sort of right." And in both cases, and in the cases which were then arising before the courts where the jurisdiction claimed, being that of a proprietary court, was a valuable property, and where each jurisdiction claimed was by virtue of a different grant, it seemed appropriate to say that the person whose jurisdiction was attacked had almost a right, or a sort of right, to have the matter discussed in the most solemn form, and subject to appeal. But if the phraseology used was that "the party had a sort of right," it is obvious that the cases are no authority for the absolute right now claimed. And there seem *to be strong authorities to [387 the contrary. In *Re Chancellor of Oxford v. Taylor* ⁽³⁾, it is stated at the end of the report, note (a), p. 974: "After the judgment was given, Lord Denman, C.J., in answer to a question put by the counsel for the University, said that the writ was to issue, and that the court, entertaining no doubt, did not mean to put the complainant to declare in prohibition." And in *re Dean of York* ⁽⁴⁾, the counsel, arguing for the defendant in prohibition, submitted that should the court incline to prohibit, they would order the party applying to declare, &c.; and the counsel for the plaintiff in prohibition

⁽¹⁾ 1 Burr., 198.⁽²⁾ 9 Q. B., 476.⁽³⁾ 1 Q. B., 952.⁽⁴⁾ 2 Q. B., 1.

1875

Worthington v. Jeffries.

retorted that it was discretionary in the court to order parties to declare or not, but the course was not to do so when the case was clear. The judgment is: "If we felt any doubt we should be bound to invite further discussion by calling upon the Dean of York to declare in prohibition; but after the full and deliberate, long-prepared, and maturely digested arguments which we have heard enforced with consummate ability by counsel of the greatest learning and of the highest reputation, no additional light can be expected. We owe it to all the parties to save them the inconvenience and anxiety of further delay." And the rule for a prohibition was made absolute. And in *De Haber v. Queen of Portugal* (¹), Lord Campbell, at p. 220, says: "If we had entertained any grave doubt upon the subject we should have directed the applicant to declare in prohibition, but being clearly of opinion that there is an excess of jurisdiction in the court below, it is our duty simply to make the rule absolute." It is true that in these cases the application was made by the defendant in the suit below, but we think it impossible that such phraseology, without any notice of any distinction, would have been so often used if the suggested right had existed. Reason and authority seem to us, therefore, to be equally against the suggested claim of right. The authorities relied on in support of the claim, when examined, failed to support it. We are, therefore, of opinion that, although the court inclines to a prohibition, the defendant in prohibition has no right to an order from the court that the plaintiff in prohibition should declare in prohibition. We are of opinion that 388] it is always in the discretion of *the court to say whether the plaintiff in prohibition shall or shall not be put to declare; and that when the court is clear both in fact and law that the inferior court is acting in excess of or without jurisdiction, the writ of prohibition should issue without the plaintiff in prohibition being put to declare. In the present case the court is of opinion that both facts and law are clear, and, therefore, that the writ of prohibition should issue, and that the rule should be made absolute with costs.

Rule absolute.

Attorney for plaintiff in prohibition: *Doyle*.

Attorney for defendant: *The City Solicitor*.

(¹) 17 Q. B., 220; 20 L. J. (Q.B.), 488.

[Law Reports, 10 Common Pleas, 388.]

April 21, 1875.

DINN V. BLAKE.

Arbitration—Mistake of Law—Application to send back Award—Compulsory Reference.

An award will not be sent back to the arbitrator on the ground that he has made a mistake in the legal principle upon which his award is based, except where the arbitrator himself admits the mistake.

THIS was an action which had been compulsorily referred to the master under the Common Law Procedure Act, and application was now made on behalf of the plaintiff that the certificate of the master might be referred back to him in order that he might review his decision. The facts, so far as material, were as follows: The master had awarded against the plaintiff. It was stated in the affidavits, that after the master had pronounced his award he had stated in a conversation with the plaintiff the grounds on which he had decided. The plaintiff sought to show that the grounds so stated showed that the master had made a mistake in point of law.

Lucius Kelly moved for a rule *nisi*. He contended that where it was clearly shown that the arbitrator had made a mistake in point of law or of fact the court would send the award back. He cited *Flynn v. Robertson* ⁽¹⁾; *In re Dare Valley Ry. Co.* ⁽²⁾; *Mills v. The Bowyers' Company* ⁽³⁾; *Re Hall and Hinds* ⁽⁴⁾; *Hodgkinson v. Fernie* ⁽⁵⁾; *Gore v. Baker* ⁽⁶⁾; *Lockwood v. Smith* ⁽⁷⁾.

BRETT, J.: The motion is to refer back the certificate to the master that he may reconsider his award under the following circumstances: It is alleged that he has stated to the plaintiff orally the ground of his decision, and the plaintiff's counsel says that upon such statement he can satisfy the court that the master decided wrongly in point of law. It is not in any way shown to the court that the master considers his decision to have been wrong. I am of opinion that in such a state of facts we have no jurisdiction to send back the certificate. This is a reference under the Common Law Procedure Act. Before that act there was some fluctuation of opinion among the judges as to the question in what cases an award might be referred back; and after the

⁽¹⁾ Law Rep., 4 C. P., 324.⁽²⁾ Law Rep., 6 Eq., 429⁽³⁾ 3 K. & J., 66.⁽⁴⁾ 2 Man. & G., 847.⁽⁵⁾ 3 C. B. (N.S.), 189; 26 L. J. (C.P.), 217.⁽⁶⁾ 4 E. & B., 470; 24 L. J. (Q.B.), 94.⁽⁷⁾ 10 W. R., 628.

act it was asserted that the powers of the court were in that respect larger than they were before. In the case of *Hodgkinson v. Fernie* (*) both questions, viz., as to when there was power to refer back and as to the effect of the statute, were considered, and the law was clearly declared in the judgment of Williams, J. He lays it down that the award cannot be sent back and the arbitrator forced to review it merely on the ground that there has been a mistake of fact or of law. The exceptions he mentions to the rule are where there has been corruption or fraud, and where it appears on the face of the award that there has been a mistake of law or fact. The plaintiff's counsel has cited certain cases to us as authorities in his favor. The first case was *In re Dare Valley Ry. Co.* (*); but in that case, as pointed out by my Brother Archibald, the arbitrator had taken into consideration what was never submitted to him, and so exceeded his jurisdiction. The other cases on which reliance was placed were *Mills v. The Bowyers' Company* (*), and *Flynn v. Robertson* (*). The latter case was decided on the authority of *Mills v. The Bowyers' Company* (*), in which case it was 390] said that the court could refer back the *award if the arbitrator himself stated that in his opinion he had made a mistake of law or fact, and was desirous of the assistance of the court and willing to review his decision on the point on which he believed himself to have gone wrong. These cases have apparently established another exception in addition to those mentioned by Williams, J. But the exception depends on the admission of the arbitrator himself. In *Lockwood v. Smith* (*) Martin, B., says: "There must be some grounds given us to suppose that the arbitrator is satisfied there has been a mistake." It appears to me that the present case is not brought within that exception. There will, therefore, be no rule.

DENMAN, J.: I am of the same opinion. I only wish to say a few words as to the decision in *Gore v. Baker* (*). In that case I was arbitrator, and there being pleas of never indebted and set-off, I was of opinion that the set-off exceeded the amount of the claim proved. I therefore found for the defendant on the plea of set-off; but a certain amount being shown to be due subject to the set-off, I found generally for the plaintiff on the plea of never indebted. The effect of this, it appeared, would have been to give the whole costs of

(1) 3 C. B. (N.S.), 189; 26 L.J., (C.P.), 217.

(2) Law Rep., 6 Eq., 429.

(3) 3 K. & J., 66.

(4) Law Rep., 4 C. P., 324.

(5) 10 W. R., 628.

(6) 4 E. & B., 470; 24 L. J. (Q.B.), 94.

the issue to the plaintiff, though he failed in establishing a large part of his claim. The Common Law Procedure Act has been recently passed, under which it is provided that in such a case the jury shall find the issues distributively. Under these circumstances I gave the defendant a letter, stating that I was quite willing to do that if the court thought proper. The court had that letter before them, though it was not referred to in the report, and accordingly sent the award back to me to find distributively on the issue of never indebted. That case seems to me to constitute an example of that exception from the general rule which my Brother Brett referred to as an addition to those laid down by Williams, J. But the court will not, in case of a mistake, send back the award without an assurance from the arbitrator himself that he is conscious of the mistake and desires the assistance of the court to rectify it. In this case there is nothing of that sort. To accede to the application would be simply to allow of an appeal from the arbitrator on a point of law.

*ARCHIBALD, J.: I am of the same opinion. The [391] general principle is that an award is final; and, assuming that it is good on the face of it, there can be no appeal from it. The only exceptions are where there is corruption on the part of the arbitrator, or excess of jurisdiction, or where the arbitrator himself admits that there is a mistake, and, as it were, craves the assistance of the court in setting it right. In this case the arbitrator has stated that he decided on certain grounds, and the plaintiff's counsel states that they are erroneous, but there is nothing to show that the arbitrator admits that he has decided erroneously. The case does not, therefore, come within the exception to the general rule.

Rule refused.

Attorney for plaintiff: *Dinn.*

[Law Reports, 10 Common Pleas, 391.]

April 23, 1875.

GRIMOLDBY V. WELLS.

Sale—Goods not equal to Sample—Rejection by Purchaser—Purchaser not bound to send back the Goods.

Where goods were sold by sample, and the bulk was found by the purchaser on inspection after delivery not to be equal to sample:

Held, that the purchaser might reject the goods by giving notice to the vendor that he would not accept them, and that they were at the vendor's risk, and was not bound to send back, or offer to send back, the goods to the vendor, or to place them in neutral custody.

1875

Grimoldby v. Wells.

APPEAL from the decision of the County Court of Lincolnshire.

The facts were as follows :

The action was brought in March, 1874, to recover the price of four quarters of tares sold by the plaintiff to the defendant. The sale was by word of mouth by sample, and the bulk was delivered on the 9th of October, 1873, to the defendant. The defendant and plaintiff lived about nine miles apart, and the tares were sent part of the way in a cart belonging to the plaintiff, and then placed in a cart belonging to and sent by the defendant, and taken by his servant into his barn, where they remained at the time of the trial of the action. On the day of the delivery the defendant inspected the bulk, and then wrote and posted a letter to the plaintiff, which however was not produced at the trial, 392] having been lost by *the plaintiff. After the letter had been posted, but before the plaintiff received it, the defendant met the plaintiff and told him that the tares were in his (defendant's) barn, that they were bad, that he would not have them, nor pay for them, and that the plaintiff might do what he liked with them. The defendant stated that the contents of the letter were to the same general effect as the verbal statement. The defendant did not return, or offer to return, the tares to the plaintiff, nor did he place them in neutral custody, but they remained in his barn as before stated. Early in January the defendant, for the purpose of showing that the tares were inferior to sample, had one of the sacks opened and "dressed over," and the result of the dressing was produced in court. The County Court judge found that the tares were not equal to sample.

It was contended for the defendant that there was no sufficient evidence of an acceptance within the Statute of Frauds, and that the goods not being equal to sample the defendant was entitled to reject them.

The County Court judge held that there was an acceptance within the Statute of Frauds, and, relying on the authority of *Couston v. Chapman* (1), that the defendant could not reject the goods without returning them, either actually or constructively, to the plaintiff, or, at any rate, placing them out of his own custody, and that having retained them in his own possession he was bound to pay for them. He therefore gave judgment for the plaintiff.

A. Wills, Q.C., for the defendant: The goods were re-

(1) Law Rep., 2 H. L., Sc., 250.

jected most unequivocally by the defendant. The only question is, whether in such a case there is any obligation to return, or offer to return, the goods, or to place them in neutral custody. The County Court judge appears to have relied on the decision in *Couston v. Chapman* ⁽¹⁾. The statement in the head-note, if it is to be construed as meaning, that there is such an obligation, is not borne out by the judgment. The only passage which could be relied on as showing there is such an obligation is that in Lord Chelmsford's judgment on p. 256, beginning "where a party desires to rescind," &c. But looking to the facts of the case it would *seem that "return" there only means "reject." 393 On the other hand, in the case of *Lucy v. Mouflet* ⁽²⁾ Martin, B., and Bramwell, B., distinctly stated that there was no such obligation.

McKellar, for the plaintiff: The County Court judge has found that there was an acceptance as a matter of fact. It is a strong thing to say that the vendor is bound to fetch the goods back any distance when, as here, the purchaser has removed them from the place of delivery.

[He cited *Cooke v. Riddellien* ⁽³⁾ and *Okell v. Smith* ⁽⁴⁾.]

LORD COLERIDGE, C.J.: I am of opinion that our judgment should be for the defendant. The first question is, whether there was an acceptance within the Statute of Frauds. It is not necessary in the view we take to decide this, but I should say that there was evidence of such an acceptance.

The next question is, whether the defendant has done anything to disentitle him to reject the goods. A person who seeks to reject goods as not in accordance with contract must do nothing after he discovers that they are so in the nature of an exercise of dominion over the goods, or inconsistent with the property in them being in the vendor. I do not see that in the present case the defendant did anything to make the goods his own. He merely left them in his barn, after distinctly giving notice to the plaintiff that he would not have them, and that he, the plaintiff, might do as he liked with them. Under these circumstances, it appears to have been pressed upon the judge that it was the duty of the purchaser if he rejected the goods, not only to abstain from exercising dominion over them, but to return them in the sense of actually sending them back to the vendor. It is admitted that there is no authority in favor of such a proposition, un-

⁽¹⁾ Law Rep., 2 H. L. Sc., 250.

⁽²⁾ 1 C. & K., 561.

⁽³⁾ 5 H. & N., 229; 29 L. J. (Ex.), 110.

⁽⁴⁾ 1 Stark., 107.

less the expressions used by the House of Lords in the case of *Couston v. Chapman* ⁽¹⁾ are such.

It appears to me manifest that no such effect can be attributed to them. The decision in that case was plainly in accordance with the settled law on the subject. What was there said was that some unequivocal act must be done by the purchaser, if he means to insist on his right of rejection, 394] to show that he does so reject; and in *that case, the court thought that there had been no such act. The proposition which it is attempted to base upon the *dictum* attributed to Lord Chelmsford, viz., that the purchaser must send the goods back, or place them in some neutral custody, forms no part of the judgment in the case. It seems to me that all that the noble Lord meant was, that if either of the courses he referred to had been taken it would have constituted an unequivocal act signifying the intention to reject.

There is no want of authority to the contrary of the proposition contended for. In the case of *Lucy v. Mouffet* ⁽²⁾ both Martin, B., and Bramwell, B., expressly lay it down that it is not necessary to send back the goods in order to entitle the purchaser to reject them. It would be very hard if it were so. By the supposition the vendor has not complied with the contract, and has sent goods which as against the purchaser he had no right to send; why should he be entitled to impose upon the purchaser, who never bargained for such goods, and who has a right to reject them, the burden of sending them back, possibly for a considerable distance, at a considerable expense? No authority, as it seems to me, can be cited for such a proposition, and the reason and justice of the thing are against it. For these reasons it appears to me that the County Court judge was wrong, and his judgment must be reversed.

BRETT, J.: There are two points in this case. First, whether there was an acceptance of these goods within the Statute of Frauds. Secondly, whether it is necessary that the defendant should in fact send back or offer to send back the goods, or put them on neutral ground, in order to be entitled to exercise his right of rejecting them. As to the first point, I decline to give any opinion, because it is unnecessary, as I think, to decide it. Lord Campbell lays it down in *Morton v. Tibbett* ⁽³⁾ as the result of the authorities, that there may be an acceptance within the Statute of Frauds, but yet no such acceptance as to preclude the defendant from

⁽¹⁾ Law Rep., 2 H. L. Sc., 250.

⁽²⁾ 15 Q. B., 428; 19 L. J. (Q.B.), 382.

⁽³⁾ 5 H. & N., 233; 29 L. J. (Ex.), 110.

rejecting the goods if not in accordance with the contract. In the present case, therefore, I only assume that there was an acceptance which did make a binding contract within the Statute of Frauds.

Putting this question aside, there is here a contract for the *sale of goods, and by agreement they are to be delivered before a fair opportunity for inspection arises; for it cannot properly be said that it would be reasonable to hold the defendant bound to examine them when they were delivered to him at half way of the journey. The defendant has a right to inspect the goods, and it seems to me that where the sale is by sample, and inspection is to be at some place after delivery, the true proposition is, that if the purchaser on such inspection finds the goods are not equal to sample, or if they are, in fact, not equal to sample, he has a right to reject them then and there, and is not bound to do more than to reject them. There are several modes in which he may reject them, some of which are pointed out by Lord Chelmsford in *Couston v. Chapman* (*), in the passage which was cited from his judgment, and which, in my opinion, is to be read not as if cumulative, but as if alternative. He may, in fact, return them, or offer to return them; but it is sufficient, I think, and the more usual course is, to signify his rejection of them by stating that the goods are not according to contract and they are at the vendor's risk. No particular form is essential; it is sufficient if he does any unequivocal act showing that he rejects them. Here the County Court judge thought that there was sufficient notice of the defendant's rejection of the goods, but he supposed himself bound to hold that the purchaser must do more than reject the goods, viz., actually send them back or offer to do so. There is not much authority to be found on the subject, but I think the general understanding has been that this is not necessary. And it appears to me that the *dicta* of Martin, B., and Bramwell, B., in the case of *Lucy v. Mouflet* (*), are right. In the case of *Heilbutt v. Hickson* (*) it was held that goods delivered in London, and sent by the purchaser to Lille, might be rejected at the latter place. The rest of the court in that case rested their opinion on some supposed new agreement, but I ventured to go further, and to say that though *prima facie* the inspection of the goods ought to have been in London, and therefore *prima facie* and with respect to any obvious defects London was the place for rejection of the goods, yet as the defect was a secret one caused

(1) Law Rep., 2 H. L., Sc., at p. 256.

(2) Law Rep., 7 C. P., 438. •

(3) 5 H. & N., 233; 29 L. J. (Ex.), 110.

1875

Grimoldby v. Wells.

by the plaintiff's workmen, so as by them to be intention-396] ally secret and one that could not by reasonable *skill and care be discovered until the goods were tested at Lille. it was as if the inspection were by the contract to take place at Lille. I stated it as my opinion, therefore, that there was a right to reject at Lille. I still hold by that opinion, and I think that when there is a sale by sample, and the time for inspection is subsequent to delivery, and the place of inspection different from that of delivery, then if the goods are found on such inspection not to be equal to sample, the purchaser has a right to reject them then and there, and it is the duty of the vendor to get them back thence.

DENMAN, J.: I am also of the same opinion. At first, I felt some difficulty, in consequence of the way in which the County Court judge has reserved the point. The question is not wholly one of law, but depends on questions of fact of which he was the judge. I doubted whether we could overrule his decision on what seems to be a mixed question of law and fact; but it seems to me that the fair construction of the case is, that he thought himself bound by law to find for the plaintiff on the ground that the defendant had not, in fact, returned the goods or done anything equivalent to a constructive return of them. The question the judge seems to have intended to reserve for our opinion is, whether his decision was in this respect right, and if so I think he was wrong, for it seems to me that all the defendant was bound to do was unequivocally to signify that he rejected the goods. I agree with the opinion expressed by my Lord and my Brother Brett in this case, and by Martin, B., and Bramwell, B., in the case of *Lucy v. Mowflet* (¹), that there need not be a return, either actual or constructive, of the goods. It is sufficient if there is, as there was in this case, a clear notice that the goods are not accepted, and are at the risk of the vendor. The only other question raised is, whether there was an acceptance within the Statute of Frauds. On this I express no opinion, as in the event it becomes unnecessary to do so.

Judgment for the defendant.

Attorney for plaintiff: *R. Dickson.*

Attorneys for defendant: *Scott & Co.*

(¹) 5 H. & N., 233; 29 L. J. (Ex.), 110.

See note 3 Eng. Rep., 193.

In an executory contract to sell and deliver an article of merchandise the law, in the absence of any special agreement, implies that it shall be of a mer-

chantable quality: *Hamilton v. Gan- yard*, 34 Barb., 204, 3 Abb. Court. App. Dec., 314, 3 Keyes, 45; *Newberry v. Wall*, 35 N. Y. Superior Court Rep., 106.

A warranty is an incident only of a completed sale; it has no present vitality and force in an executory contract of sale: *Osborn v. Gantz*, 60 N. Y., 540.

In an executory contract to sell property of a particular description, *without warranty*, the vendee must examine it within a reasonable time, ascertain the defect, if any, notify the vendor thereof and offer to return it: *Dutchess Co. v. Harding*, 49 N. Y., 321, 3 Eng. Rep., 193 note; *McCormack v. Sarson*, 45 N. Y., 265; *Charlotte, etc., v. Jessup*, 44 How. Prac., 448; *Woodward v. Libby*, 58 Maine, 42; *Osborn v. Gantz*, 60 N. Y., 540; *Woodie v. Whiteney*, 23 Wisc., 55; *Conrad v. Dater*, 2 Bissell, 342.

See *Wentworth v. Dows*, 117 Mass., 14; *Drew v. Roe*, 41 Conn., 41.

And may recover freight paid upon the goods: *Conrad v. Dater*, 2 Bissell, 342.

This rule does not however apply to a sale of what is known to be refuse, as of slops from a distillery: *Holden v. Clancy*, 41 How., 1.

But where the acceptance is induced by artifice or fraud of the vendor, by reason of which an examination is prevented or interfered with, the acceptance is not binding as an assent to the quality, and the vendee's rights are unimpaired thereby: *Dutchess Co. v. Harding*, 49 N. Y., 321; *Owens v. Sturgis*, 67 Illinois, 366.

If the property cannot be examined without great inconvenience or injury thereto until used, it is not necessarily a defence that the buyer did not promptly examine it: *Atwater v. Clancy*, 107 Mass., 369; *Cox v. Long*, 69 N. C., 7; *Conrad v. Dater*, 2 Bissell, 342.

See *Drew v. Roe*, 41 Conn., 41.

So if the defect be not, with ordinary diligence, discoverable until sale and use: *Shields v. Pettie*, 4 N. Y., 122, 2 Sandf., 262; 1 Pars. on Cont. (6th ed.), 592.

An executory contract to manufacture and deliver articles, corresponding in all respects to a sample shown, binds the party to furnish articles equal to the sample in manufacture, material, description, quality, fitness and durability, for the use for which they were designed: *Gurney v. Atlantic, etc.*, 58 N. Y., 358.

If a defect exists which could not be determined on examination upon receipt of the articles, but only upon use,

it is not the duty of the vendee to rescind the contract, or offer to return the property upon discovery; but he may retain them and recover or recoup his damages: *Gurney v. Atlantic, etc.*, 58 N. Y., 358.

Where a party takes a reaper and mower on trial, with the understanding that if it suit him he will pay the price demanded, and if it do not he will return it to the place whence he took it, and he fails to return it or give any notice to the vendor of his dissatisfaction with its performance, the latter is justified in treating the transaction as an absolute sale, and entitled to recover the contract price: *Spickler v. Marsh*, 34 Md., 222.

See *Wartman v. Breed*, 117 Mass., 18; *Bonnell v. Jacobs*, 36 Wisc., 60.

In New Hampshire it is held the seller should declare upon the special contract and not for goods sold and delivered: *Clay v. Bohonon*, 54 N. H., 474.

But if there be a warranty the vendee may recover for a breach thereof without an offer to return: *Day v. Pool*, 52 N. Y. Rep., 416; *Parks v. Morris, etc.*, 54 N. Y., 586, affirming 60 Barb., 140; *Quintard v. Newton*, 5 Rob., 72; *Day v. Pool*, 63 Barb., 506; *Dowse v. Dow*, 57 N. Y., 16; *Vincent v. Leland*, 100 Mass., 432; *Bonnell v. Jacobs*, 36 Wisc., 60; *Owens v. Sturgis*, 67 Illinois, 366; *Doane v. Dunham*, 65 Illinois, 512; *Cox v. Long*, 69 N. C., 7.

So if there be fraud in the sale: *White v. Sutherland*, 64 Illinois, 181; *Owens v. Sturgis*, 67 Illinois, 366.

See *Quintard v. Newton*, 5 Rob., 72.

Where material is to be sold to be manufactured into articles of merchandise, with warranty of its quality for that purpose, upon a breach, the difference in value between the articles made of the defective material, and similar articles made of material equal to the warranty, is a proper measure of damages. The vendee is not confined to the market prices to ascertain that difference: *Parks v. Morris, etc.*, 54 N. Y., 586, affirming 60 Barb., 140; *Dowse v. Dow*, 57 N. Y., 16; *Passenger v. Thorburn*, 34 N. Y., 634; *Milburn v. Belloni*, 39 N. Y., 53; *Messenon v. N. Y., etc.*, 40 N. Y., 527; *Heinemann v. Heard*, 50 N. Y., 37; *Ferris v. Comstock*, 33 Conn., 513.

See *Hoe v. Sanborn*, 36 N. Y., 98;

1875

Birchall v. Pugin.

2 Am. Law Review, 505; 35 How., 204; *Mullett v. Mason*, L. R., 1 C. P., 559.

Unless the seller of an article be the manufacturer, knowledge on his part that the article is intended for a specific purpose will not be sufficient to authorize the finding of a warranty of fitness therefor: *Bartlett v. Hoppock*, 34 N. Y., 118; *Chauter v. Hopkins*, 4 Mees. & Welsb., 399.

See however *Brown v. Edgington*, 2 Scott New Rep., 496, 2 Man. & Gr. 279, 1 Drinkwater, 106, where a wine merchant ordered from the defendant a rope to be used for raising wine, and the defendant not having such an one as was desired undertook to furnish one; held, that a warranty was implied that the rope should be fit and proper for the purpose, and that the defendant was liable in case for consequential damages resulting from the insufficiency of the rope—he being con-

sidered, as between the parties, the manufacturer. It seems the rule extends to all cases where the buyer has a right to and does rely upon the skill and judgment of the seller: *Leopold v. Van Kirk*, 27 Wisc., 152; *Boothby v. Scales*, 27 Wisc. 626; *Hoce v. Sanborn*, 21 N. Y., 552; *Bigge v. Parkinson*, 7 Hurlst. & Norm., 955, 8 Jurist, N. S., 1014.

It is only where an article is contracted for to be applied to a particular purpose, and in such manner that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer and not to his own, that there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied: *Charlotte, etc., v. Jessup*, 44 How. Prac., 447.

See *Ruihven v. Straker*, Blackham, Dundas & Osborn, 180; *Rice v. Forsyth*, 41 Maryland, 389.

[Law Reports, 10 Common Pleas, 397.]

April 28, 1875.

397]

*BIRCHALL V. PUGIN.

MOLLOY, Garnishee.

Attorney's Charge for Costs on "Property recovered"—Attachment of Debts—Priority—
23 & 24 Vict. c. 127, s. 28—*Common Law Procedure Act*, 1854, s. 61.

The defendant having recovered a sum of money in an action brought by him against M., B., the defendant's attorney in that action, had taken out a summons for an order charging his costs in such action upon the sum recovered. The plaintiff afterwards, having recovered judgment in his action against the defendant, obtained an ex parte garnishee order attaching the sum recovered by defendant against M., in execution.

Under these circumstances the parties came before a judge at Chambers, B., claiming to have a charging order on the judgment debt as property recovered within the 28th section of 23 & 24 Vict. c. 127, and the plaintiff claiming an order on M. to pay the sum attached to him. The judge made an order in favor of B.:

Held, that he was right in so doing; that the sum recovered was property within the section, and that the attorney was entitled to priority.

THIS was an application by way of appeal from the decision of Brett, J., at Chambers, refusing to make an order under the 61st section of the Common Law Procedure Act, 1854, that one Molloy should pay two sums of £69 and £110 to the plaintiff. The facts were as follows: The plaintiff had recovered judgment in the action, and sought to attach in execution two sums of £69 and £110 which were due to the

defendant Pugin from Molloy by the award of an arbitrator, to whom an action by Pugin, the defendant, against Molloy, and all matters in difference, had been referred. A Mr. Button had acted as Pugin's attorney in the action of *Pugin v. Molloy* and the arbitration. On the 6th of February Button took out a summons at Chambers for an order under 23 & 24 Vict. c. 127, s. 28, charging the costs due to him in respect of the action of *Pugin v. Molloy* and the reference upon the sums recovered. Before the hearing of that summons the plaintiff Birchall, having recovered judgment in his action against Pugin, obtained a garnishee order *ex parte* attaching the two sums of £69 and £110 under the 61st section of the Common Law Procedure Act, 1854. The case then came before Brett, J., at Chambers, when Button claimed to have an order charging his costs upon the sums *recovered as [398 aforesaid, and the plaintiff Birchall claimed an order, under the 61st section of the Common Law Procedure Act, 1854, that Molloy should pay them to him as the execution creditor in the action of *Burchall v. Pugin*. After the award in *Pugin v. Molloy* had been made, and before the costs were taxed, Mr. Pugin withdrew Button's retainer and employed another attorney.

The learned judge refused to make the order in favor of the plaintiff, as before mentioned, and made a charging order in favor of Button (*).

Anderson moved for a rule *nisi* calling on the garnishee to pay the sums of £69 and £110 to the plaintiff. The garnishee order having been served binds the funds in the hands of the garnishee, and the attorney is not entitled to priority: *Hough v. Edwards* (*). The attorney's lien cannot prevail over an attachment of the debt, under the Common Law Procedure Act, 1854. In *Eisdell v. Coningham* (*) and *Sympson v. Prothero* (*) there was notice of the attorney's lien. Here the plaintiff had no notice at the time when the garnishee order was obtained. Secondly, the attorney's right to a charge does not arise until he has completely finished the proceedings in the suit. He ought to get the costs

(1) 23 & 24 Vict. c. 127, s. 28 :

"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, &c., it shall be lawful for the court or judge before whom any such suit, &c., has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge

upon and against and a right to payment out of the property, of whatsoever nature or kind the same may be which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit," &c.

(*) 1 H. & N., 171; 26 L. J. (Ex.), 54.

(*) 28 L. J. (Ex.), 213.

(*) 26 L. J. (Ch.), 671.

1875

Birchall v. Pugin.

taxed, and recover as much as he can from the other side before coming upon the sum recovered. Thirdly, it is submitted that these funds are not property recovered within the meaning of the Attorneys and Solicitors Act (23 & 24 Vict. c. 127, s. 28). The section refers to specific property recovered as in an action of detinue or real property, not a mere debt or chose in action: *Wilson v. Hood* ⁽¹⁾. Fourthly, the [399] court has a discretion in the matter, and will not *give the attorney a charge when the garnishee order has been already obtained without notice.

LORD COLERIDGE, C.J.: I think there should be no rule. This case comes before us by way of appeal against the decision of my Brother Brett, refusing to make an order under the 61st section of the Common Law Procedure Act, 1854, against the garnishee to pay to the plaintiff Birchall a sum of £179. [His Lordship then stated the facts of the case.] Under these circumstances, the learned judge in effect decided that the attorney was entitled to priority. It appears to me that his decision was right. One objection made by the counsel for Birchall was that the sum in question was not "property" recovered within the meaning of 23 & 24 Vict. c. 127, s. 28. I am of opinion that that objection cannot prevail. The words used in the section are of the widest possible character, and include all property of whatsoever kind; not only property known to the common law, but property of every kind. It seems to me that this is property of some kind: it is a chose in action. If authority were wanting on the subject, it appears to me that there is abundant authority to be found in the decisions. The case of *Wilson v. Hood* ⁽¹⁾ was cited as showing that the section was limited to real property, but the real question in the case was whether realty was included in the section, and the court held that it was. It was not disputed that personal property of all sorts was within the section. The next question is whether the attorney's claim to a charge on the property is to be defeated by the action subsequently taken under the garnishee clauses of the Common Law Procedure Act. The language of the latter part of the 28th section of 23 & 24 Vict. c. 127, is strongly in favor of the attorney's claim. It is enacted that all acts done to defeat, or which shall operate to defeat, such charge or right, shall, except in favor of a *bona fide* purchaser for value without notice, be absolutely void as against such charge or right. There is, it seems to me, strong authority against the contention of the plaintiff's counsel. In the cases of *Eisdell v. Coningham* ⁽²⁾ and *Sympson v.*

⁽¹⁾ 3 H. & C., 148.

⁽²⁾ 28 L. J. (Ex.), 213.

Prothero (¹), it was held that the attorney's claim *to [400 be satisfied his charges out of the property which had been recovered by his exertions was entitled to priority. In the case of *Eisdell v. Coningham* (²) the garnishee actually had to refund the money. In the present case either party, in the absence of the other, was entitled to be paid this sum of money; the question is, which is entitled to priority? I think the decision of my Brother Brett, that the attorney, having first taken steps to attach this money in respect of his costs, was entitled to priority, was correct. There is nothing in the objection that the costs in the action of *Pugin v. Molloy* had not been taxed by Button. He was dismissed by Pugin, and had no power or authority to do what it is suggested he ought to have done.

BRETT, J.: The attorney was the first to take steps to attach the money by taking out the summons for the charging order. That of itself did not operate as a charge, and before the hearing of that summons the garnishee order was made *ex parte* under the 61st section of the Common Law Procedure Act, 1854. That order does in a sense charge the debt, and the garnishee may voluntarily pay the sum charged to the execution creditor; but by the latter part of the 61st section, if he refuses to pay he must be ordered to appear to show cause why he should not pay, and a subsequent order must be obtained against him for payment. Consequently in such a case the garnishee order obtained *ex parte* is not effective without a subsequent order. The state of things was therefore this at the date of the hearing before me. Neither party had perfected his right. Button had a summons to charge the debt only, and Birchall had an order only binding *prima facie* and in the absence of cause being shown to the contrary. Neither party could obtain the money without an order. Under these circumstances it is objected on behalf of Birchall that these sums of money are not "property" within the meaning of the 28th section of 23 & 24 Vict. c. 127. Now it seems to me that they are. Something has been recovered for Pugin by the exertions of Button. That something is the right of immediate payment of two ascertained and specified amounts or sums of money. They are two judgment debts. The words in the section, which are *"property of any kind," seem to me to be [401 large enough to cover such a right as Pugin has to these two sums. If Pugin had paid money into his own account at his bankers, the amount would obviously, I think, be property, although the bankers would not be bound to repay or

(¹) 26 L. J. (Ch.), 671.

(²) 28 L. J. (Ex.), 213.

pay out the same coins. These two sums, ascertained by legal decision to be due to Pugin, though still in the hands of Molloy, seem to me to be equally capable of being called property. I think that even before the act in equity money recovered by a decree was treated as property upon which an attorney would have an equitable lien.

It is also objected that Button, not having proceeded to tax the costs in the proceedings against Molloy, is not entitled to the charge upon the property recovered. I will not say what might have been the effect if there had been no change of attorneys, but Button was dismissed by Pugin after the sums in question had been recovered. It would be a very strong thing to say that under these circumstances he is not entitled to his costs. I think that there was without doubt a debt due to him in respect of which he was entitled to a charge if Birchall's claim were out of the way. The last question therefore is, which of these parties is entitled to priority? Neither of them having completed his right, which is entitled to the preference? I think the judgments in the Admiralty cases, e.g., in *The Jeff Davis* ⁽¹⁾, though not absolutely binding, and also the decisions in equity, are strong authorities to show that when the attorney is the meritorious cause of the recovery of the sum in question, his claim upon it for costs is entitled to priority. On the strength of that equity, neither party having perfected his right, I thought Button was entitled to have his charge upon the money in preference to the execution creditor. Until the execution creditor's position is perfect, I think the court is bound to prefer the attorney, without whose services there would by the hypothesis have been no fund on which either party could have claimed.

HUDDLESTON, J., concurred.

Rule refused.

Attorneys for plaintiff: *Poole & Hughes.*

⁽¹⁾ Law Rep., 2 A. & E., 1.

See notes 2 Eng. R., 628, 3 Eng. R., 625.

Where a settlement was collusively made it was set aside and the attorney held entitled to his lien for costs: *Nugent v. O'Brien*, Blackham, Dundas & Osborn, 208; see also *Kirwan v. Hampton*, Id., 227.

But the settlement must be collusive: *Moore v. Angell*, 2 New Prac. Cas., 194.

The court will not ordinarily make a summary order requiring an attorney to be paid the amount of his lien: *Holcroft v. Manby*, 1 New Prac. Cas., 9.

An attorney has a lien upon a judgment recovered by him for any sum agreed upon between him and his client as a compensation for his services, as well as for the costs in the judgment, and to the amount of such lien is to be deemed an equitable assignee. When the recovery is solely for costs, the judgment itself is a legal notice of the lien, and this lien cannot be discharged by payment to any one but the attorney.

But where the judgment is for damages and costs it is not notice of the

lien, even for the taxed costs, and such lien can be protected only by notice to the judgment debtor: *Marshall v. Meech*, 51 N. Y., 140.

An attorney has a lien upon his client's papers in his possession: *Bowling Green, etc., v. Todd*, 64 Barb., 146; *Supervisors v. Brodhead*, 44 How. 411; *Estate of Hutchins*, 54 Law Times (Folio), Eng., 168.

An attorney acquires a lien for his costs upon the recovery of a judgment, and where notice of the lien is given to the judgment debtor the court will protect the lien. But the retaining of an attorney to prosecute an action gives him no lien upon what may, in the event of a trial, be recovered therein.

Plaintiff having obtained a judgment in an action for assault and battery, assigned it to his attorney as security for costs, notice of which assignment

was given to defendant. Upon appeal the judgment was reversed and a new trial granted, costs to abide the event. Before the new trial the parties settled and plaintiff executed to defendant a release. Held the attorney had no lien, legal or equitable, which could affect the settlement, and his subsequent proceedings must be set aside without conditions: *Pulver v. Harris*, 52 N. Y., 73; *Trist v. Child*, 1 MacArthur, 1.

But see *Pleasants v. Korretcht*, 5 Heiskell (Tenn.), 694; *Hoss v. Wilson*, 1 MacArthur, 474; *Stanton v. Haskin*, 1 MacArthur, 558; *Adams, etc., v. Andy*, 1 MacArthur, 642.

An attorney is not compellable to produce, as a witness, documents intrusted to him in the capacity of an attorney: *Queeley v. Warren*, Bl., Dund. & Osb., 169.

[Law Reports, 10 Common Pleas, 402.]

May 5, 1875.

***WELLS V. THE MAYOR, ALDERMEN, AND BURGESSES [402
OF KINGSTON-UPON-HULL.**

Contract—Corporation—Seal—Interest in Land—Statute of Frauds, s. 4.

The defendants, a municipal corporation, were possessed of a dock of which they allowed the use to ships needing repairs, under certain printed regulations. The plaintiff entered into a parol agreement with the defendants for the use of the dock, upon the terms of such regulations. By these regulations it was provided that the dock should be "let" to parties requiring the same for the repair of vessels at such rates as the council of the borough should from time to time sanction, and that vessels entered in a book kept by the borough treasurer should be allowed to enter the dock, as far as possible, according to the order of entry in the book. The regulations contained provisions that the defendants should be entitled to detain the vessel in the dock until the dockage was paid, that the corporation foreman should open and shut the dock gates, and various other provisions tending to show that the defendants intended to retain possession of and control over the dock while in use by vessels. The defendants did not admit the plaintiff's vessel into the dock in her turn:

Held, in an action for breach of contract by the plaintiff against the defendants, that the contract was not for an interest in land within the 4th section of the Statute of Frauds, and therefore need not be in writing; and, secondly, that the contract need not be under the seal of the corporation.

DECLARATION for breach of a contract by which the defendants were to allow a certain steamship of the plaintiff to be docked in the defendants' graving dock in her turn, during the execution of certain repairs to the said ship.

Plea (*inter alia*), denial of the agreement.

The facts, as proved at the trial before Archibald, J., at

1875

Wells v. Kingston-upon-Hull.

the Yorkshire Spring Assizes, 1874, were as follows: The defendants were a municipal corporation, and were the owners of a graving dock. Certain printed regulations had been established by them for the use of the dock, which were as follows:

"1. The dock will be let to parties requiring the same for the repair of vessels, at such rates as the council of the borough shall from time to time sanction.

"2. With a view to secure to parties, as far as possible, the use of the dock in the order of priority of application, a book is kept by the borough treasurer at the town hall, in which the names of all vessels intended for repair in the dock must be entered, and, as far as practicable, priority 403] will be given to vessels in the order of *entry, subject, nevertheless, to these regulations; and also, in case of any question as to priority of any vessels, such question shall be determined by the borough treasurer in such manner as he shall see fit, and his decision shall be final.

"3. No changing of turns will be allowed.

"4. No vessel is to be entered in the book except by a written order from the owner or master.

"5. On entering each vessel, a sum of £3 3s. shall be paid to the borough treasurer as entrance money.

"6. The entrance money will be allowed as part of the dockage if the account for such dockage, and moneys payable in respect of the vessel, shall be paid within ten days after the same is sent in. If the account is not so paid, the entrance money will be absolutely forfeited. The entrance money and the right of turn for the use of the dock will also be absolutely forfeited if the vessel does not take her turn at the time specified at the time of entry, or subsequently fixed by notice (written or verbal) given to the owner, master, or other person in charge, or having the docking of the vessel.

"7. The treasurer may, on behalf of the corporation, notwithstanding the preceding regulations, require payment of all dockage or other moneys payable in respect of any vessel before such vessel is allowed to leave the dock, and, to preserve the lien of the corporation, may detain such vessel, and dockage in respect of the vessel will be chargeable during such time as she may be detained in the dock.

"8. The corporation foreman will open and close the dock gates for the docking and undocking of vessels as may be required.

"9. The ground blocks and horizontal shores of the corporation may be used for vessels in the dock, but the parties

using the same must take all risks and responsibility in respect thereof, and of selecting and placing the same.

"10. If any injury or damage should be done to the dock, dock gates, engines, machines, blocks, shores, or other property of the corporation, by any vessel or person employed therein or connected therewith, or if any of the blocks or shores are left adrift or lost, full compensation to be assessed and fixed by the corporation surveyor shall be paid by the occupier of the dock or owner of the *ves- [404 sel, and the compensation when so fixed shall in like manner as dockage be deemed moneys payable in respect of the vessel, and shall be paid and recoverable accordingly.

"11. The dock must be cleaned out each day at the expense of the vessel occupying it to the satisfaction of the corporation foreman or other person in charge of the dock, and in the event of the occupier of the dock not fulfilling this regulation, the corporation will do the work, and all charges or expenses in respect thereof shall be charged to the occupier of the dock or owner of the vessel and deemed moneys payable in respect of the vessel, and be paid and recoverable accordingly.

"12. The corporation will, for the convenience of parties occupying the dock, afford the usual facilities for using the same, but on this distinct stipulation, that the dock will in all cases be let subject to the parties occupying the same undertaking all risks and responsibilities whatsoever, as the corporation, not being a trading body, will not be responsible for any injury, damage, or detention, however caused, occurring to any vessel while docking, or undocking, or being in the dock, or for any damage whatsoever resulting to the owner of such vessel or any other person connected therewith."

It appeared that the plaintiff had paid to the borough treasurer £3 10s. as entrance money for the ship, according to the regulations, and the ship was entered in the turn book. When the turn of the vessel came, another vessel was admitted in her stead. It was contended for the defendants that, to render the defendants liable, the contract ought to have been in writing, as being a contract for an interest in land within the 4th section of the Statute of Frauds, and that it ought to have been under the seal of the corporation. The verdict passed for the plaintiff, leave being reserved to enter a verdict for the defendants on the above grounds. A rule *nisi* had been obtained accordingly, against which

Wills, Q.C., and *Mellor*, showed cause: This case comes

1875

Wells v. Kingston-upon-Hull.

within the exceptions to the rule that a corporation can only contract under seal. With reference to matters of ordinary business constantly recurring and matters of urgency, 405] it has been always held *that a seal is not necessary. It would be absurd that every time a ship was to enter the dock for repairs it should be necessary to call a meeting of the corporation for the purpose of affixing the seal. [They cited on this point *Arnold v. Mayor of Poole* ('); *South of Ireland Colliery Co. v. Waddle* ('); *Mayor of Ludlow v. Charlton* ('); *Mayor of Kidderminster v. Hardwick* ('); *Austin v. Guardians of Bethnal Green* ('); *East London Waterworks Co. v. Bailey* (').]

Secondly, the case is not within the 4th section of the Statute of Frauds; there is no intention that any interest in the land should be given to the plaintiff; the whole scope of the regulations is that the corporation should retain all rights of property and possession in the dock. [They cited on this point *Smith v. Overseers of St. Michael, Cambridge* ('); *Dean v. Hogg* ('); *Wright v. Stavert* ('); *Watkins v. Overseers of Milton-next-Gravesend* ('); *Roads v. Trumpington* ('); *Wood v. Leadbitter* (').]

Maule, Q.C., and *Cave*, supported the rule: There is no exception to the general rule requiring a corporation to contract under seal within which this case can fairly be brought. There is no reason for relaxing the rule on the ground of necessity or urgency in this case, because the borough treasurer, if appointed under seal, could be authorized by the terms of his appointment to affix the seal on behalf of the corporation to any contract that might be necessary.

[They cited on this point *Copper Miners' Co. v. Fox* (').]

With regard to the second point the plaintiff is in this dilemma. If the license to occupy the dock is revocable, it was revoked. If it was irrevocable, it must be because it was a license coupled with an interest. What interest can there be but an interest in the land? *Wright v. Stavert* (') 406] and that class of cases is *not applicable, for there is not in the case of a servant, or a governess, or the lodger at a boarding-house, a right to occupy any particular room or portions of land. It is contended that this agreement amounts to a demise of the dock. The plaintiff has the ex-

(1) 4 M. & G., 860.

(2) Law Rep., 3 C. P., 463; Law Rep., 4 C. P., 617.

(3) 6 M. & W., 815.

(4) Law Rep., 9 Ex., 13.

(5) Law Rep., 9 C. P., 91.

(6) 4 Bing., 283.

(7) 3 E. & E., 383.

(8) 10 Bing., 345.

(9) 2 E. & E., 721; 29 L. J. (Q.B.), 161.

(10) Law Rep., 3 Q. B., 350.

(11) Law Rep., 6 Q. B., 56.

(12) 13 M. & W., 838.

(13) 16 Q. B., 229; 20 L. J. (Q.B.), 174.

clusive right to all the beneficial enjoyment of the dock while he occupies it. Even if the defendants were by the agreement to retain the legal occupation of the dock, the plaintiff was to have a use of it in the nature of an easement. [They cited on this point *Reg. v. Winter* ⁽¹⁾; *Webb v. Paternoster* ⁽²⁾; *Wood v. Lake* ⁽³⁾; *Rex v. Inhabitants of Horn-don* ⁽⁴⁾; *Inman v. Stamp* ⁽⁵⁾; *Edge v. Stafford* ⁽⁶⁾; *Reg. v. St. Martin* ⁽⁷⁾; *Selby v. Greaves* ⁽⁸⁾; *Hancock v. Austin* ⁽⁹⁾; *Horsev. Graham* ⁽¹⁰⁾; *Taylor v. Waters* ⁽¹¹⁾; *Rex v. Can-ersham* ⁽¹²⁾; *Buszard v. Capel* ⁽¹³⁾; *Mayor of Yarmouth v. Groom* ⁽¹⁴⁾; *Smart v. Jones* ⁽¹⁵⁾.]

LORD COLERIDGE, C.J.: This case has been argued at considerable length, but it seems to me that it admits of decision on tolerably plain and simple grounds. The first point, viz., whether a contract in writing was essential, depends on whether, by the terms of the agreement between the parties, it was intended to confer an interest in land, or whether, apart from any intention, the effect of the agree-ment was such as necessarily to confer such an interest. Now *prima facie* it appears to me that such an agreement as this is not what would be generally understood as dealing with an interest in land. In ordinary language it is a con-tract for the use of a graving dock. It is possible that in a contract for the use of such a dock such an exclusive right to the possession of the dock as to amount to an interest in land might be intended to be given, and then a written con-tract would be necessary. I cannot think that there was any such intention here.

*The terms of the regulations seem to me altogether [407 inconsistent with the notion that the parties intended to give an interest in the land itself, or that the agreement between them amounted to the giving of such an interest. The mere use of the word "let" in the first regulation, and the words "occupiers of the dock" in some of the other regulations, is not of itself sufficient to create such an interest. It is ob-vious that they are not used as terms of art according to a strict unalterable legal signification, and they must be con-structed in connection with the whole of the document. The

⁽¹⁾ 2 Salk., 587.

⁽²⁾ Palm., 71; Popham, 151.

⁽³⁾ Say., 8.

⁽⁴⁾ 4 M. & S., 562.

⁽⁵⁾ 1 Stark., 12.

⁽⁶⁾ 1 C. & J., 391.

⁽⁷⁾ 3 Q. B., 204.

⁽⁸⁾ Law Rep., 3 C. P., 594.

⁽⁹⁾ 14 C. B. (N.S.), 684; 32 L. J. (C.P.), 252.

⁽¹⁰⁾ Law Rep., 5 C. P., 9.

⁽¹¹⁾ 7 Taunt., 374.

⁽¹²⁾ 4 B. & C., 683.

⁽¹³⁾ 8 B. & C., 141.

⁽¹⁴⁾ 1 H. & C., 102; 32 L. J. (Ex.), 74.

⁽¹⁵⁾ 15 C. B. (N.S.), 717; 33 L. J. (C.P.), 156.

1875

Wells v. Kingston-upon-Hull.

provisions that priority is to be given according to the order of application only so far as possible, and that the borough treasurer is to decide all questions that may arise as to priority, and that his decision shall be final, do not seem very consistent with the notion that an absolute and exclusive interest in land was to be given as suggested. Down to the 7th regulation there is, at any rate, nothing inconsistent with the dock remaining in the possession and under the control of the corporation. The 7th regulation provides that the vessel may be prevented from leaving the dock if the dockage is not paid: in other words, the supposed tenant is not to be at liberty to walk out of the tenement the exclusive possession of which is supposed to have been demised to him. The only way of preventing this would be by the corporation's locking the gates, for an injury to which it was suggested in argument trespass would lie by the shipowner. It seems to me that the right to do such an act is the strongest possible evidence of the intention to preserve the authority of the corporation over the dock. By the 8th regulation again the corporation foreman is to open and shut the dock gates. So that the supposed tenant is not to have power to open and shut the doors of the tenement supposed to be demised to him. The provisions as to use of the blocks, shores, &c., and as to damage done to the property of the corporation, seem to point to the same conclusion, viz., that the intention is that the contract shall be for the use of the corporation's property, but not for the grant of the occupation or possession of the land. The 11th regulation speaks of the corporation foreman or other person in charge of the dock. Judging of the intention from all these provisions 408] *taken together, I should say that the defendants plainly never meant to part with the possession of or control over the dock; the contract is merely for the use of the dock in a certain way and on certain terms while remaining in their possession and under their control. I can see nothing in any of the words of the regulations which, apart from the general intention apparent in the whole of them, necessitates our giving the agreement the effect contended for by the defendants. It seems to me that the view we take is well within the authority of the decided cases. In the case of *Smith v. Overseers of St. Michael, Cambridge* (¹), very strong words indeed were construed as not having the effect of taking the possession or property out of the party contracting. It is true that that was a rating case, and, therefore, not precisely in point, but the principle laid down in

(¹) 3 E. & E., 383.

the judgments seems applicable in the present case. Hill, J., says: "We must look not so much at the words as the substance of the agreement, and taking the whole together, we think it must be construed not as a demise of five rooms, but as an agreement by which the appellant, retaining possession of those rooms and keeping his servant there, bound himself to supply the other party there with fire, gas, and attendance. It is true exclusive enjoyment of the rooms is to be given, but that is the case where a guest in an inn or a lodger in a house has a separate apartment, or where a passenger in a ship has a separate cabin; in which case it is clear the possession remains in the innkeeper, lodging-house keeper, or shipowner." So here, looking to the substance of the agreement, I think there was no intention to pass an interest in land. The case of *Wright v. Stavert* ⁽¹⁾ is also strongly in point. I adopt the words of Hill, J., in the case where he says: "The defendant's position here is directly analogous to that of a domestic servant or a governess, or a person employed to build a house upon another's land; all of whom have a right incidental to their respective contracts to go upon land in order to carry out their contracts, but none of whom take under their contracts any interest in the land upon which they are entitled to go." These words seem exactly to hit the distinction between the cases within and those not within the *statute. Here I think the [409] defendants did not intend to confer any interest in land, though they did give plaintiff a right to go on to the land in order to carry out the contract. I do not think we are called on to discuss the nice question raised upon the effect of *Wood v. Leadbitter* ⁽²⁾ in Mr. Cave's ingenious argument, viz., as to whether the plaintiff was a licensee without an interest, and so must fail, because the license had been revoked; or a licensee with an interest, and so the license, being irrevocable, amounted to an interest in land. The dilemma suggested does not, as I think, arise. The contract did not relate to the possession or enjoyment of the land or any right over it, but only to the use of it under very stringent regulations, the defendants retaining themselves complete possession of and all rights over it.

The second question is, whether the contract required a seal. There is no doubt a distinction between trading and other corporations; but I can find no authority for the position that a municipal corporation, when engaged in any trading transaction, is to have the same immunity as a corporation created under an act of Parliament for the very

⁽¹⁾ 2 E. & E., 721; 29 L. J. (Q.B.), 171.

⁽²⁾ 13 M. & W., 838.

purpose of trading. I treat this case as that of a municipal corporation, and one to which the exception in favor of trading corporations is inapplicable. But on reference to the authorities it will be seen that from the very earliest times certain exceptions to the rule that required a seal were established. These are very conveniently summarized in the judgment in *Church v. Imperial Gas Light Co* ⁽¹⁾. The law, as there laid down, is cited by the Court of Exchequer with approval in the case of *Mayor of Ludlow v. Charlton* ⁽²⁾, a case in which the court took a view adverse to the right of persons contracting with corporations without a seal. The principle laid down is that "wherever to hold the rule applicable would occasion very great inconvenience or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring or too insignificant to be worth the trouble of affixing the common seal, are established exceptions." It appears [410] to me *that this case comes well within the description there given of the kind of acts which may be done by a corporation without their seal. The admission of a ship into the dock was a matter of frequent ordinary occurrence, and in some cases it might be a matter of urgency admitting of no delay. For these reasons I am of opinion that the rule should be discharged.

DENMAN, J.: I am of the same opinion. In considering the question whether this was a contract for an interest in land within the Statute of Frauds, I think the court ought to look to the substance of the whole agreement which arose upon payment of the entrance money on the terms of the regulations, and not to isolated expressions in such regulations, such as the use of the word "let" in connection with the dock. It would be an absurd mode of construction to take such a word as conclusive in one direction in such a document as this, when other expressions subsequently occur which point the other way. A good illustration is afforded by the very first regulation, where the word "let" is employed; but when we come to the consideration instead of the word "rent" which would be appropriate in the case of a demise, we find the word "rate." Many other such observations occur with relation to the terms of the regulations, but it is unnecessary to go through them in detail. It seems to me that, looking to the whole of the agreement, it does not amount to a demise of the dock or a contract for an interest in land, but only to an agreement for the use of the

(1) 6 A. & E., 846, at p. 861.

(2) 6 M. & W., 815, at p. 822.

dock for repairing the ship, subject to the control of the corporation, and without depriving them for a moment of the full right of possession and property over it. To apply the tests that have been suggested, it appears to me that it would be idle to say that the plaintiff had such an occupation as would be ratable, or that he could bring trespass, or that he would have any other right of action in respect of the land except upon the agreement.

It is unnecessary for me to go through the decisions on the subject. The case of *Wood v. Lake* (¹) is the nearest to this; and I cannot find that, with reference to the point we are now deciding, it has ever been overruled. It was questioned in *Wood v. *Leadbitter* (²), but only so far as it [411] might be considered to be a decision on the question of the necessity for a seal; and Lord St. Leonards is stated to have been dissatisfied with it, but it does not appear to have been overruled. If it is to be considered as a binding authority, I think it concludes the present case. With regard to the second point, I agree that there was no necessity for a contract under seal. The exceptions to the general rule that a corporation can only express its will by means of its seal are very well set out in Chitty on Contracts, 6th ed., p. 251, citing from the judgment in *East London Waterworks Co. v. Bailey* (³). One of the exceptions there given is "where the acts done are of daily necessity to the corporation." I think the act done here fairly comes within the meaning of that exception. The term "daily" must be construed only as applicable to many of the particular matters of business forming examples of the exception, and not as limiting the exception exclusively to acts strictly of "daily" necessity. The business of the dock could not be carried on without great inconvenience by the corporation if, on every occasion when a ship was to be let into the dock for repairs, a contract under seal was necessary. The fourth exception given is where the acts to be done must be done immediately, and where it would be impossible to wait for the formality of the corporation seal. It would probably be very often almost impossible, as a matter of business, that vessels should be kept waiting to enter the dock until a contract under seal could be executed. There is a distinction, no doubt, between trading and municipal corporations, but the exceptions to which I have referred apply to municipal corporations. In truth, the same general principle seems to govern the principle of exception applicable to both trading and municipal corporations alike. Best, C.J., in *East London*

(¹) Say., 3; 13 M. & W., 848, n. (a). (²) 13 M. & W., 838. (³) 4 Bing., 283.

Waterworks Co. v. Bailey (*) says, "The principle of necessity applies to corporations created for purposes of trade, such as the Bank of England." And he then goes on to show how the principle of necessity applies to trading corporations. Though he recognizes the distinction between trading corporations and others, the ground he seems to put 412] it upon is, that the principle of *necessity which applies to all corporations alike, only authorizes trading corporations to do certain acts without using their seal, because such acts are necessary for the very purpose of their existence, which is not the case with other corporations. I am disposed to think that the supposed distinction in the cases between trading corporations and others amounts to no more than this.

However this may be, I am of opinion that the present case falls within the exceptions from the rule that are applicable to municipal corporations.

HUDDLESTON, J.: I am of the same opinion. As to the first question, viz., whether this contract must be in writing, we have to consider whether the parties intended to create or the terms of the agreement did in fact create the relation of landlord and tenant, or give an exclusive right to the occupation of the dock, or any other such right as would amount to an interest in land within the statute. It seems to me clear that there was no intention that the dock should be in the exclusive occupation of the plaintiff as tenant, and I do not think, when the whole of the regulations are looked at, that anything in the nature of an interest in the land was created. It is contemplated that some one will always have the charge and management of the dock on behalf of the corporation. The case of *Watkins v. Overseers of Milton* (') seems to illustrate the plaintiff's contention very well. There the appellant had granted to him a right to have his hulk moored in a particular spot, and he was held not to be subject to a rate in respect of the occupation of such moorings. Mellor, J., says: "I think the agreement is only a personal license to the appellant to moor his hulk to the moorings, and although no other person could interfere with that right, and the conservators could not allow anybody to do so without bringing an action against them, yet the agreement only amounts to this, 'I give you liberty to moor the hulk there, and I will not give liberty to anybody else.' I do not think the fact that the appellant has the exclusive use of the moorings makes any difference." So here it appears to me the agreement only amounts to

(*) 4 Bing., 283.

(*) Law Rep., 3 Q. B., 350.

this,—“You may come into the dock, and may *have [413 the exclusive use of it in your turn, and for that use of it you shall pay so much.” Moreover, the defendants are to have a lien on the ship for the dockage. All the authorities show that an agreement of this kind does not amount to a contract for an interest in land so as to be within the statute.

As to the second point, I agree with what has been said by the rest of the court. Lord Denman, C.J., in the case of *Church v. Imperial Gas Co.* (1), thus laid down the law: “The general rule, however, has from the earliest traceable periods been subject to exceptions, the decisions as to which furnish the principle on which they have been established. This principle appears to be convenience amounting almost to necessity.” The case of *South of Ireland Colliery Co. v. Waddle* (2) may also be referred to as an authority, for though that was the case of a trading corporation, the principles which govern the exceptions to the general rule in the case of all corporations were exhaustively set forth. Again, in *Austin v. Guardians of Bethnal Green* (3) the same principles were affirmed. It appears to me that, according to the authority of all these decisions, the present is one of those cases which come within the exception and not the rule.

Rule discharged.

Attorneys for plaintiff: *Pritchard & Sons, for Stearfield.*

Attorneys for defendants: *Collyer-Bristow & Co.*

(1) 6 Ad. & E., 846.

(2) Law Rep., 3 C. P., 463; Law Rep., 4 C. P., 617.

(3) Law Rep., 9 C. P., 91.

[Law Reports, 10 Common Pleas, 414.]

May 11, 1875.

[IN THE EXCHEQUER CHAMBER.]

*MAVRO and Another v. THE OCEAN MARINE [414
INSURANCE COMPANY(1).

Marine Insurance—“General Average as per Foreign Statement”—“Warranted free from Average unless general”—Voyage broken up before Arrival at Port of Destination.

A policy of insurance on a cargo of wheat shipped from Varna to Marseilles contained the usual memorandum against average unless general, and the following term “general average as per foreign statement.”

The ship, after starting from Varna, met with heavy weather, and was forced to carry a great press of canvas to avoid a lee-shore. This caused her to strain very much, and having sprung a leak and become otherwise disabled, she was brought to

(1) Affirming 10 Eng. Rep., 325.

1875

Mavro v. Ocean Marine Insurance Co.

the port of Constantinople. It was found, on a survey, that a fifth of the wheat had been damaged; and the surveyors recommended that the voyage should end at Constantinople, and the damaged part of the wheat should be sold, and the rest transhipped to Marseilles. It appeared that the repairs necessary for the ship would have taken from one to two months. Under these circumstances, the recommendation of the surveyors was carried out and an adjustment of average in respect of ship and cargo was made at Constantinople. In such adjustment the damage which the cargo of wheat had sustained was treated as general average, and in accordance with such average adjustment a certain sum of money became payable by the underwriters upon the policy. The law by which the adjustment ought to have been regulated according to the law and usages prevailing at Constantinople under the circumstances was the law of France, and the average adjustment was made up in all respects in conformity with such law. In an action on the policy by the owners of the wheat, the defendants paid into court sufficient to cover the plaintiffs' claim on all the items of the average adjustment except the damage to the wheat which, by the law of England, would not under the circumstances be a general average loss:

Held, in a special case stated in the action (affirming the decision of the court below), that the voyage was rightly brought to an end at Constantinople, and the average adjusted there, and that the defendants were liable in respect of the damage done to the wheat.

ERROR from the judgment of the Court of Common Pleas, upon a special case in favor of the plaintiffs.

The facts are set out in the report of the case in the court below⁽¹⁾.

Butt, Q.C., for the defendants, contended, first, that the terms in the policy "general average as per foreign state-415] ment," only made "the underwriters liable in respect of sums of money the assured might have to pay under foreign average adjustments, and that to give it any further effect would be to make it contradict the well-known meaning of the memorandum against average unless general; secondly, that the average adjustment ought not to have been made at Constantinople, but at Marseilles.

[He cited *Simonds v. White*⁽²⁾; *Harris v. Scaramanga*⁽³⁾.]

Watkins Williams, Q.C. (with him *McLeod*), for the plaintiffs, were not called upon.

COCKBURN, C.J.: I think the judgment of the court below should be affirmed. Two questions are raised by this case. The first is, whether the loss sustained by the plaintiff is a loss within the terms of this policy: the second is, whether in this case the adjustment was properly made at Constantinople instead of at Marseilles, the port of destination. The first question altogether turns on the terms of the policy. There is the usual clause in the policy whereby the goods were warranted free from average unless general, or the ship was stranded. And there is also the term "general average as per foreign statement." Mr. Butt contends that, with respect to this particular case, the question whether the loss

⁽¹⁾ Law Rep., 9 C. P., 595, 10 Eng. R., 325.

⁽²⁾ 2 B. & C., 805.

⁽³⁾ Law Rep., 7 C. P., 481.

was particular or general average is to be determined by English law, notwithstanding the clause that general average is to be as per foreign statement. This does not appear to me to be a satisfactory construction. I do not see how that clause is consistent with the contention that the question whether this is general average is to be determined according to English law. The only sensible construction appears to be this: the underwriter is only to be liable for a general average, but what is general average is to be determined by the law of the foreign place to which the ship is bound. Now, it is admitted that this is a general average loss according to the foreign law, though not according to the English.

The contention that the extent to which the underwriter is to be liable in respect of general average according to foreign law is confined to what the owner of cargo has to contribute in respect of a general average loss, was not, I think, maintained. It follows, *therefore, if this were a general [416] average loss according to foreign law, that it is recoverable under the policy. There remains, however, the question whether the adjustment was properly made at Constantinople. That depends on whether the voyage was properly put an end to there. The adjustment must be made at the port of destination, if it be reached, but if the voyage is interrupted by some supervening cause, which necessitates or justifies its termination at some intermediate place, that place is the proper place of adjustment. The vessel here was compelled to put into Constantinople in consequence of sea damage. Repairs were necessary which must take a long time. It is admitted that the damaged portion of the cargo was properly sold, but it is said that the rest ought to have been taken on if the master could possibly get the ship repaired. It is laid down by high authority that it is the master's duty to repair the ship and proceed with the voyage, if it can be done within a reasonable time, and at a reasonable cost. But the repairs here took two months, and this statement of the master's duty refers to his duty as between himself and the shipowner. He has also a duty as agent of the cargo-owner, if the voyage is interrupted by a supervening necessity. Looking at the delay that would have occurred, the captain did, in my opinion, exercise a sound discretion in terminating the voyage at Constantinople. I do not rest my judgment on what took place in the Consular Court. I have grave doubts as to whether those proceedings were within the jurisdiction of the Consular Court, though I express no definite opinion on the point. My judgment on this

1875

Mavro v. Ocean Marine Insurance Co.

point rests on the ground that the voyage was properly determined at Constantinople. If I could see any sensible difference had been caused to the position of the underwriter, I should have thought there was more foundation for Mr. Butt's argument; but it appears to me that the meaning of the statement in the case is that the average stater at Constantinople made the adjustment in conformity with the law of France, taking into consideration the interruption of the journey at Constantinople and all the circumstances of the case. This being so, I do not see how the underwriter was injured by the statement being made at Constantinople.

BRAMWELL, B.: I am of the same opinion. As I understand [417] stand *the defendants' contention, it is that the words "general average as per foreign statement" only make the underwriter liable in respect of a contribution which the cargo-owner has to pay to such a general average loss by foreign law, but, except to that extent, do not make him liable in respect of any loss that would not be according to English law general average. That contention is founded on the memorandum by which the corn is warranted free from particular average, and it is said that the effect would be that the plaintiffs would get compensation for what is particular average by our law, and the warranty would be rendered ineffective if the plaintiffs' contention were correct. Now, it is not correct to say that the warranty would be rendered inoperative. There is no repugnancy in the plaintiffs' contention. The corn is warranted free of general average, but the question what is general average is to be determined as per foreign statement, that is as a foreign average adjuster would state it. The difficulties in the way of any other contention seem to me insuperable. It would be impossible to adopt the foreign rules as to what the cargo-owner was to contribute and exclude it as to other matters. With regard to the question whether the average loss was properly adjusted at Constantinople, I also think the judgment below should be affirmed.

BLACKBURN, J.: I also am of opinion that the decision of the court below should be affirmed. Long before a policy of insurance was thought of, by the law of the Rhodian Republic it was laid down that where there was a common adventure of the property of several, if it became necessary in consequence of perils of the sea purposely and intentionally to sacrifice part of the property adventured for the preservation of the rest, the owners of the property preserved should contribute to the loss of the owner of that which was so sacrificed for the common benefit. This law has since been

adopted in the code of every civilized country, but unfortunately there has been a difference in different countries as to what ought to be considered a sacrifice for the common benefit, and consequently a general average loss. The law of England does not consider when a stress of canvas is put on to avoid a lee-shore, and the ship is thereby strained, and water gets in to the *damage of the cargo, that there [418 is any intentional sacrifice made of part of the property imperilled, for the good of the common adventure. It is not necessary now to say which law is the wisest. It is enough to say that, according to the law in France and at Constantinople, this would be a general average loss, though by English law it would not. What is the effect of this state of things as applied to the language of this policy? There is the usual memorandum that is found in English policies, viz., that corn among other things is warranted free from average, unless general, or the ship be stranded; that is, the underwriters will not be liable for any but a total loss, unless the partial loss arises from the stranding of the ship, or unless such partial loss is one which is occasioned by a sacrifice made for the benefit of the whole adventure. It does not say that the underwriters will bear a partial loss by reason of a contribution to a general average loss, but that they will bear a general average loss. In an ordinary English policy the words "general average" would refer to that which was according to English law considered a sacrifice for the general good. But inconveniences were found to arise in this respect, because when vessels were bound to a foreign country it frequently happened that the ship and cargo were taken possession of by a foreign court of admiralty, and the adjustment of average took place according to the foreign law. It is a question that has never distinctly been settled, whether under an ordinary English policy in such cases the English underwriter could be compelled to bear what was held to be a general average loss by the law of the foreign country. To avoid this difficulty, express clauses have been inserted in policies. Some of such clauses have been framed on the footing that when the vessel was caught in a foreign country, and contributions had to be paid, the underwriters should bear those payments. The defence here proceeds on the notion that such is the meaning of the present policy. I think that, though it might have been so framed, it is not. I construe the words "general average as per foreign statement" to mean that general average in the policy shall include such losses as the French law regards as intentional sacrifices made for the benefit of the whole adventure, not only such

1875

Mavro v. Ocean Marine Insurance Co.

losses as a foreign average adjuster shall actually state. 419] Putting aside the question whether *the Consular Court at Constantinoplē had jurisdiction to do what it did, which in my view is immaterial, the next question is whether Constantinople was the proper place at which to adjust the average. With respect to that, I agree with what my Lord has said. I look upon the statements in the case as meaning that, in the average statement at Constantinople, the figures were correctly worked out according to French principles.

POLLOCK, B.: I am of the same opinion. If the construction put on this policy by the court below had the effect, as suggested, of making the clause "general average as per foreign statement" entirely destroy and obliterate the warranty against particular average, I should hesitate before affirming the judgment, as that would be contrary to the well-known canon that requires a meaning to be given to every part of an instrument, if possible. I do not, however, think the effect suggested is produced. The object of the clause against average, unless general, is to prevent claims for partial damage with respect to various articles. Full effect is given to this, according to the plaintiffs' contention. All that they seek to do is in interpreting the meaning of "general average" in the memorandum, to read in the other clause "general average as per foreign statement." I look upon the reasonable construction as being, that "general average" in this policy means general average according to foreign, not English, rules.

AMPHLETT, B.: I am of the same opinion. The defendants' argument is, that under the words "general average as per foreign statement," any additional burden thrown upon the owners of cargo by foreign law comes within the policy; and so, if this loss were a contribution by cargo to ship, the underwriters could not resist payment of it; but that, if the loss be one sustained by the cargo itself, as that by the English law would fall upon the owner of cargo under the circumstances, it is particular average only and is excluded by the memorandum. The contention is that such a loss is not an extra loss caused by reason of a foreign statement. The reason of the thing does not point to such a construction of the policy. Suppose the cargo to have belonged to two owners, the plaintiff and another, the damage 420] had been *caused to that part belonging to the other owner, the plaintiff's part of the cargo would have had to contribute according to French law. Such a case would come within the terms "general average as per foreign state-

ment," even according to the defendants' contention, and the underwriters must have borne the loss. What difference, substantially, does it make that the cargo all belonging to one owner, no such contribution is made? Nevertheless the clause might, no doubt, have been so worded as to give rise to Mr. Butt's argument. Looking, however, to the words used, I agree that the meaning is, that although average is not to be recoverable unless general, what is general average is to be determined by the rules of the foreign law.

Judgment affirmed.

Attorney for plaintiffs: *Nash.*

Attorneys for defendants: *Waltons, Bubb & Walton.*

[Law Reports, 10 Common Pleas, 420.]

May 12, 1875.

[IN THE EXCHEQUER CHAMBER.]

PHILLIPS V. MILLER and Another⁽¹⁾.

Vendor and Purchaser—Sale of Real Property—Incumbrances—Terms of existing Tenancies, Notice of—Agreements collateral to Tenancies.

Part of an estate consisted of three farms in Hampshire, and, in that county, valuations between outgoing and incoming tenants for hay, straw, and manure, are made at "fodder value," which is lower than what is called "market value." The three tenants of the farms held under verbal agreements, from year to year, according to the custom of Hampshire. The defendants were devisees of the estate in trust for sale, and, in contemplation of a sale, they gave notice to the tenants to quit at Michaelmas, 1869. The tenants alleged that they had been promised leases by the devisor, and although there was nothing to show that such promises were binding in law or equity, the defendants, thinking the claim binding in honor and conscience, entered into agreements with the tenants, by which, in consideration of their giving up possession of their farms according to the notices, the defendants promised to remit the half-year's rent due at Michaelmas, 1868, to pay £100 to the tenant, and to pay for hay, &c., at the termination of the tenancy, at "market value." In June, 1868, the estate was put up for sale by auction. In the particulars and conditions of sale the three farms were described as in the occupation of the tenants respectively till Michaelmas, 1869, at certain rents, and certain incumbrances, subject to which the sale was made, were specified, viz., land-tax and tithe rent-charge; but no express mention was made of the above-mentioned agreements with the tenants. The conditions stipulated "that the property should be taken to be correctly described as to quantity and otherwise, and that if any error, misstatement, or omission should be discovered, the same should not annul the sale, nor should any compensation be allowed, and that the rent or possession should be received or retained and the outgoings discharged by the vendors up to the 29th of September and from that day by the purchaser. The property was bought in at the sale by auction, and afterwards sold by private contract on the 18th of July, 1868, to the plaintiff. The contract described the property as in the foregoing particulars, and as being purchased subject to the foregoing conditions. At the time of the purchase the plaintiff had no knowledge of the above-mentioned agreements with the tenants. Upon his be-

(1) Reversing 8 Eng. Rep., 490.

1875

Phillips v. Miller.

coming aware of and objecting in respect of them, it was agreed that he should complete without prejudice to his claim to be indemnified in respect of the agreements to pay market value for the hay, &c. The plaintiff afterwards paid the tenants the amount of the valuations of hay, &c., at market value, and now sought to recover the difference between that and fodder value from the defendants:

Held (reversing the decision of the court below; Amphlett, B., dissenting), that the agreements with the tenants to pay market value were collateral agreements binding only on the defendants personally, and did not amount to fresh demises; and that by the arrangement between the parties, the plaintiff, having paid the tenants' claims, could recover the difference between market and fodder value from the defendants as money paid for their use.

Per Amphlett, B., the agreements amounted to fresh demises, as to which there was no duty cast upon the defendants to disclose the terms of them to the plaintiff, and as to which a court of equity would not enforce compensation against the vendors; and, consequently, that the action was not maintainable.

ERROR from the judgment of the Court of Common Pleas in favor of the defendants. The facts of the case appear in the report of the case in the court below (*).

Channell, for the plaintiff, contended that the agreements with the tenants to pay market value were personal only, and did not create new tenancies on the terms that market value should be paid; that, consequently, the defendants ought to have paid the tenants the difference between market and fodder value, and that the effect of the arrangement between the parties was that the payment by the plaintiff of such difference was a payment for the use of defendants at their request.

Herschell, Q.C., for the defendants, contended that the effect of the agreements was to create fresh tenancies on the terms of the agreements and the former tenancies, except so far as altered by the agreements. [The court then intimated to him that he need not argue the other questions in the case.]

422] *In addition to the authorities referred to in the judgment, *Johnstone v. Hudlestone* (*) and *Gore v. Wright* (*) were cited.

The arguments and authorities cited sufficiently appear from the judgments.

Cur. adv. vult.

May 12. The following judgments were delivered:

AMPHLETT, B.: This is an appeal from the judgment of the Court of Common Pleas upon a special case, by which the plaintiff was denied any relief in respect of the difference between market and fodder values of hay, straw, and manure, which he had been obliged to pay to three tenants of an estate purchased by him from the defendants.

The facts of the case are fully stated in the judgment of

(*) Law Rep., 9 C. P., 196; 8 Eng. Rep., 490.

(*) 4 B. & C., 922.

(*) 8 A. & E., 118.

Lord Coleridge in the court below ⁽¹⁾, and I do not consider it necessary to repeat them here.

The question in some of its aspects depends upon the true construction of the agreements of the 11th of May, 1868, entered into between the defendants and the three tenants respectively, who were then under notice to quit at Michaelmas, 1869. There was some difference, but not of much importance, in the language of such agreements, but that which was entered into between the defendant and Mr. Parker, the principal tenant, and to which I will mainly confine myself, was as follows :

“Memorandum. Whereas it is alleged by Robert Parker, of Headley, Hampshire, farmer, that the late, Sir Charles Hayes Miller, of Froyle, Hampshire, Bart., agreed to grant to the said Robert Parker a lease of the farm, lands, and hereditaments at Headley, aforesaid, and at Frensham, in the county of Surrey, now in his occupation. And whereas the trustees of the will of the said Sir Charles Hayes Miller have served a notice upon the said Robert Parker, requiring him to quit and deliver up to them, on the 29th day of September, 1869, the said hereditaments. And whereas the said several parties have agreed to enter into the arrangement hereinafter appearing. Now be it known that in pursuance of the said agreement, and for the sake of preventing *disputes and differences, and also in consideration of [423 the agreement for remission of rent by the said trustees hereinafter contained, the said Robert Parker hereby agrees to deliver up to the said trustees, as aforesaid, or their assigns, or other the person or persons for the time being entitled to the freehold of inheritance of the said hereditaments, on the 29th day of September, 1869, possession of the said farm, lands, and hereditaments held by him as aforesaid; and in further pursuance of the said agreement, and in consideration of the said Robert Parker agreeing to relinquish possession of the said hereditaments as last aforesaid, the said trustees hereby agree to allow or remit to the said Robert Parker the half-year's rent which will become due to them in respect of the said hereditaments on the 29th day of September, 1868, and also to pay to him on the said 29th day of September, 1868, the sum of £100, and also to *pay or allow* to the said Robert Parker on the said 29th day of September, 1869, *or at the termination of his tenancy*, for all the hay, straw, and manure produced on the farm during the preceding year, at market value.”

(1) Law Rep., 9 C. P., 201.

At the conclusion of the argument of the plaintiff's counsel in support of the appeal, the court expressed an opinion that if the arrangement as to the market value was to be taken as a term of the holding or incident to it, the judgment of the court below was right. It was, however, contended on the part of the plaintiff, that according to the true construction of the agreement, such arrangement was in truth not a term of the holding or incident to it, but a collateral agreement binding the defendants personally, and not the land, and since in that case different considerations may arise as to the right of the plaintiff to recover in the action, it becomes necessary to determine whether such contention is tenable.

Now, the first thing to be observed is that the arrangement as to market value was undoubtedly a change in one of the terms of the original holding, and as Lord Denman said in *Doe d. Monck v. Geekie* (*) (where there had been a change of rent), the common-sense view of the transaction would appear to be, that, although there may have been a new contract, its terms must have been understood to be that all was to go on as under the old contract, except as to 424] the valuation at the determination of the tenancy. *It is said, in opposition to this view, that other parts of the agreement, as for instance the payment of the £100, was clearly collateral (which is true), but I fail to see what difference that makes. There would be no inconsistency in a landlord saying to his tenant, "Accept the notice to quit, and I will give you £100 down, and improve your position as tenant by altering some of the terms of your holding." But then it was said that, to render valid a new contract, such as I have mentioned, when any change is made in the terms of the holding, there must be a surrender in law of the old contract, and that there was here no sufficient acceptance by both parties of the new contract to admit of such surrender. I am unable to follow this argument, because it appears to me that the signature of both parties to the agreement is the most satisfactory evidence of their acceptance that could be given.

No doubt a surrender in law of the old contract was not in the contemplation of either party, but that, as Baron Parke said in *Lyon v. Reed* (*), is unnecessary. What is material to inquire into is, whether it can be made out from the terms of the agreement that it was intended that the tenant should receive market value, on the termination of his tenancy, from his landlord, whoever he might be, and I

(*) 5 Q. B., 841.

(*) 13 M. & W., at p. 306.

think it can. For I can see nothing in the agreement itself to limit the tenant to a remedy against his existing landlord, and if we look to the consequences of such a construction, it is hardly credible that such could have been the intention of the parties. For what, on this construction, would be the position of the tenant at Michaelmas, 1869, in the event which happened? He might clearly be forced to leave his produce on his farm on receiving fodder value, and for the rest of the market value he would lose the lien which an outgoing tenant always has on his produce, and have to look only to the personal security of the vendor, who might have become insolvent. Nor would the vendor's position be a more pleasant one, or more likely to have been contemplated; for he would not know, until Michaelmas, 1869, arrived, how much he would have to pay, since it would be at the will of the tenant, within certain limits, how much produce he would leave, and the tenant would in most cases leave much more than he would have done if holding at fodder value.

*Suppose, again, the vendor, under these circumstances, should die without selling before Michaelmas, 1869, either intestate or having devised the estate; the consequence of the arrangement as to the valuation being collateral would be that, not the heir or devisee, but the personal estate would have to bear the difference between the market and fodder values, and the tenant would, as before, be able to increase or diminish the amount at his pleasure.

Again, suppose that the vendor did not sell, and survived Michaelmas, 1869, and then by receipt of subsequent rent, or otherwise, waived (as he might do) the notice to quit, can it be doubted that the tenant would be entitled to be paid market value at any future time when he left his farm? If the vendor afterwards sold, or died as before, and the purchaser, or heir, or devisee (as the case may be) did not signify his dissent to the continuance of the tenancy by giving notice to quit, the tenant would, according to *Buckworth v. Simpson* ⁽¹⁾, continue on the same terms. And these terms, by the hypothesis, are to leave produce at fodder price. When, then, should the vendor or his executors pay the difference? It must be either at the time when a new contract is implied between the tenant and his new landlord, or at the final termination of the tenancy, which might be years afterwards.

Either alternative would, I think, be found inconvenient, and, from its novelty alone, objectionable.

(1) 1 C. M. & R., 834.

Still further, if it were held that the provision as to market value was collateral only, and did not bind the land, it would follow that, notwithstanding actual notice of the agreement to the purchaser before he entered into his contract, he would not be bound by the provision. This would certainly be a most startling result.

So also with regard to the forty-five acres in Surrey, where the custom of the country is for the tenant to receive market value, can it be right that a purchaser who is supposed to have bought on the faith of the tenancy being on the customary terms, should receive the difference between that and fodder value? Yet this would appear to be the necessary result of the plaintiff's contention.

426] *All these anomalies and difficulties would disappear, and justice be done to all parties, including, as I think I shall show, the purchaser, by simply adhering to the ordinary rule that a provision of this kind so intimately connected with the tenancy is part of its terms, and binds the land.

For the above reasons, I am of opinion that the contention of the plaintiff that the provision was collateral only cannot be sustained. It was urged by Mr. Herschell that if the provision was collateral only, and did not bind the land, the plaintiff had nothing whatever to do with it, and that any payment he may have made under it was in his own wrong, and could not be recovered in this action. I should be sorry to be obliged to rest my judgment on such a technical ground; and I am disposed to agree with my Brother Blackburn that by virtue of the arrangements come to between the parties on the completion of the contract, and on the settlement of Parker's action, the payment would, in the case supposed, be held to have been made at the defendant's request.

It only remains for me to give my reasons for agreeing with the rest of the court, that, if I am right in the construction I have put upon the agreement, the plaintiff is not entitled to recover anything in this action.

The plaintiff's right, if any, to an "indemnity" (which word may, I think, be fairly taken to include what is more properly called "compensation") is reserved to him by the agreement of the 6th of January, 1869, or it would have been extinguished both at law and in equity by the conveyance. Had the plaintiff then any such right while the contract remained *in fieri*? That must depend upon whether, under the circumstances of this case, there was any duty cast upon the defendants to disclose to the plaintiff that the

tenants were entitled to be paid for their produce at market price. I think there was not. There was no fraudulent concealment or misrepresentation of the fact which was publicly mentioned at the auction; and it appears to have been a mere accident that it was not known to the plaintiff. The names of the tenants, and their rents, and the time their tenancies determined were disclosed, and the plaintiff therefore had ample opportunity of ascertaining all the particulars respecting them which he required; and considering that the estate lay in two counties, in one of which the custom *of the country gave the tenants fodder price and [427 the other market price, I think that the plaintiff ought to have inquired which custom prevailed on the estate he was going to purchase, if it was thought at the time of any real importance. Under these circumstances, I think it quite clear that a court of equity would not have enforced either indemnity or compensation against the vendors, although it possibly might have refused a decree of specific performance at their suit, unless they consented, as regards the lands in Hampshire, where the custom of fodder value existed, to give such indemnity or compensation.

The view which the courts of equity have taken of cases of undisclosed rights of tenants as between vendor and purchaser in the absence of fraud or misrepresentation appears to be this. If those undisclosed rights are trifling in their character, and the purchaser might with a little exertion have discovered them, the court will grant specific performance against him without compensation. That was done by Sir W. Grant in *Hall v. Smith* (*), which, though considered by Lord St. Leonards as an extreme case, is treated by him as an authority: see *Vendors and Purchasers*, vol. i. p. 11, 10th ed. If such rights are more important, or there are any circumstances which would make it a case of hardship on the purchaser to enforce the contract, the court will hold its hand, and refuse specific performance, unless compensation is consented to by the vendors.

The cases cited in the argument of *Hughes v. Jones* (*), *Martin v. Cotter* (*), and *Caballero v. Henty* (*), are examples. In the last case particularly the true limits of the doctrine of constructive notice of a tenancy as between vendors and purchasers is very clearly laid down. But in no case of the kind that I am aware of has the court enforced the contract against the vendor with indemnity or compensation; and the

(*) 14 Ves., 433.

(*) 3 D. F. & J., 307.

(*) 3 J. & Lat., 496.

(*) Law Rep., 9 Ch., 447.

1875

Phillips v. Miller.

case of *James v. Lichfield* ⁽¹⁾ is a direct authority against it, and, although some *dicta* in that case are open to criticism, as carrying the doctrine of constructive notice of tenants' rights as between vendors and purchasers to an unreasonable [428] extent, and were disapproved of on that account in **Cabbalero v. Henty* ⁽²⁾, I am not aware that the decision has ever been impugned.

In taking this course, the courts no doubt have had regard to the injustice that would often be worked by enforcing compensation against vendors, who may, with perfect honesty, as in this case, have failed to disclose some particular, and who would rather take back the estate than submit to any reduction of the purchase-money.

It may well be thought that sufficient is done for the purchaser to satisfy justice if he has the option of escaping from the contract. If, as in this case, the purchaser elects to keep the estate, it is a fair inference that he is not dissatisfied with his bargain.

Another reason for not awarding compensation in a case like this is the difficulty of estimating the amount. As I have already pointed out, it would be unjust to take (as is proposed in this case) the difference of market price and fodder price of the produce actually left on the farm, because the tenant would naturally leave a much larger produce if he was to receive market price for it, than if he was to receive only fodder price.

The only fair way of estimating the compensation would be to charge the vendor with the difference on the average quantity that would be left by a tenant at fodder price, and that would be very difficult to ascertain. In addition to what I have said, I am also much disposed to think that the ninth condition of sale, which declared that, if any error, misstatement, or omission in the particulars or the conditions should be discovered, the same should not annul the sale, nor should any compensation be allowed or given by the vendor or purchaser in respect thereof, would, of itself, be held to prevent any claim for compensation being successfully made, though it would not, of course, prevent the court from refusing specific performance, as that would not amount to an annulling of the contract.

For these reasons, I am of opinion that the judgment of the court below is right, and ought to be affirmed; but as I have the misfortune to differ from the rest of the court, I need hardly say that I express this opinion with the greatest possible diffidence.

⁽¹⁾ Law Rep., 9 Eq., 51.

⁽²⁾ Law Rep., 9 Ch., 447.

*POLLOCK, B.: The facts of this case are so fully set [429 forth in the judgment of the Court of Common Pleas, that it is unnecessary for me to recapitulate them.

It was contended for the plaintiff that the agreements dated the 11th of May, 1868, did not affect the tenancies which then existed between the defendants and their tenants, but were only a compromise by the landlords of a claim made by the tenants for leases whereby the tenants undertook to forego their claim and deliver up possession on the 29th of September, 1869, in consideration of the landlords' allowing them the half-year's rent due September, 1868; paying to them £100 on the 29th of September, 1868, and also allowing them at the determination of the tenancy market value instead of fodder value for all the hay, straw, and manure left on the farm.

For the defendants it was contended that the effect of these agreements was to create a new tenancy, and that, if so, the plaintiff, as vendee, when he purchased the estate, having notice of the existence of such tenancies was bound to inquire into the nature of them, and having failed to do so, could establish no right of action against his vendors in respect of any liability which arose out of the terms of such tenancy; his rights being governed by the principle acted upon in the cases of *Taylor v. Stibbert* (*), *Hall v. Smith* (*), *Daniels v. Davison* (*) and *James v. Lichfield* (*).

Mr. Channell, in arguing for the plaintiff, admitted that if the effect of the agreements was that for which the defendants contended, the legal consequence asserted by them would properly follow. It may be open to some doubt whether, having reference to the recent decision of the Lords Justices in *Caballero v. Henty* (*), this admission would not go too far; but it is unnecessary to consider this now, because, in my opinion, the view which was presented to us on behalf of the plaintiff of the agreements in question is the correct one.

In considering this question I will take the agreement with the tenant Parker, which, in substance, is the same as the others. At the date of this agreement there was a subsisting tenancy from *year to year, and although that [430 was created by parol, it was, when supplemented by the custom of the country, complete as to rent and all usual terms, including the payment by the landlord at the expiration of the tenancy for hay and straw at fodder value.

(*) 2 Ves. Jun., 437.

(*) 14 Ves., 433.

(*) 16 Ves., 253; 17 Ves., 433.

(*) Law Rep., 9 Ex., 51.

(*) Law Rep., 9 Ch., 447.

1875

Phillips v. Miller.

The agreement of the 11th of May is in writing, and, therefore, its construction is wholly for the court, and having carefully studied its language and object, the conclusion at which I have arrived is that it well expresses and carries out that which the parties doubtless intended, namely, to give the tenant who forewent his supposed right to demand a lease, a pecuniary benefit by remission of rent, by a payment of money, and by the landlord purchasing at the end of the term his hay, straw, &c., at a valuation more favorable to him than that which he would, under the terms of his tenancy, have received.

It contains no words of demise, no reservation of rent, or terms of holding, nor any language adapted to, or suggesting, the creation of a new tenancy, or the continuance of an existing tenancy, and nothing from which I can infer an intention to import into the written agreement any of the terms under which the tenant held; and where this is so, I cannot, contrary to the legal import, and contrary to what appears to be the object and intention of the parties, assume that an existing tenancy is terminated and a new one created.

It was truly said by Parke, B., in *Lyon v. Reed* (¹), that in certain cases a surrender is not the result of intention, because there can be no question of intention; but the cases to which he refers are those in which acts have been done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. "The law there says that the act itself amounts to a surrender." In the present case I find not only that there is no such act, but that to presume such an act would be contrary to the intention of the parties.

It was strongly pressed upon us by Mr. Herschell, in arguing for the defendants, that unless the new terms contained in the agreement of the 11th of May were held to be 431] a part of the tenancy, *they would not be binding upon any one who should become landlord by death or assignment, and that the tenant could not bring an action against his new landlord for any breach of its terms. It seems to be clear, however, that even could we properly hold that the new terms were a part of the tenancy, no such action would lie. At common law, rent is an incident of the reversion, and a reversioner may sue for it as a debt; but contracts with a lessor relating to the mode of enjoyment or of quitting the premises demised, did not, before the statute

(¹) 18 M. & W., at p. 306.

of Henry VIII., pass with the reversion, but were merely personal contracts; and this is so still where there is no lease under seal, and in such a case the assignee of the reversion cannot sue the lessee upon the contracts contained in the lease between the lessee and the assignor. This was so decided in *Standen v. Christmas* (¹), and by parity of reasoning it was held in *Bickford v. Parsons* (²) that the lessor, where there is only a parol lease, by assigning his reversion does not lose any of his rights of action against his lessee.

There are cases in which a reversioner may become entitled to the benefit and liable to the obligation of terms identical with those which were contained in a parol lease with the original landlord; but to effect this there must be a new contract supported by its own consideration. Thus in *Buckworth v. Simpson* (³) it was held that where there is a tenancy from year to year, if the then new landlord and tenant allow the time for giving notice to quit to elapse without giving such notice, a new contract may be implied to the effect that the new landlord and tenant will adhere to the terms of the tenancy, and on this new contract either party may sue the other; but the necessity for this implication shows that there must be a new contract, and here there is none.

For the decision of this case, however, it is necessary to look at the facts in a broader and less technical manner, and to deal with it by considering what it was that the defendants undertook to convey to the plaintiff. The judgment of the Court of Common Pleas proceeds on the ground that the plaintiff was not entitled to have the farms conveyed free from any claim of the tenants to be paid on the termination of their tenancies at a higher rate than *fodder [432 value; there being, it is said, no words in the contract, nor facts found in the case, from which it can be gathered that such a condition is to be incorporated into the contract. To this proposition I cannot assent. Taking Parker's farm as an illustration, what is it that the defendants agreed to sell, and the plaintiff to buy, in respect of that farm? It was described as "a farm in the occupation of Mr. Parker till Michaelmas, 1869, at the low annual rent of £580." The contract is dated the 18th of July, 1868, and its subject matter was a farm which Mr. Parker was to occupy till Michaelmas, 1869, and by the 11th condition the plaintiff was to take the rents or possession at Michaelmas, 1868.

Conditions of sale are not necessarily nor indeed usually

(¹) 10 Q. B., 135; 16 L. J. (Q. B.), 265.

(²) 1 C. M. & R., 834.

(³) 5 C. B., 920; 17 L. J. (C. P.), 192.

1875

Phillips v. Miller.

expressed in the technical language of conveyancers; the expression, "a farm in the occupation of Mr. Parker till Michaelmas, 1869," at a certain rent, appears to me clearly to mean that Mr. Parker was entitled to hold as tenant till that time, and at that rent, and that consequently the subject-matter of the contract was the reversion subject to Mr. Parker's tenancy.

Had Mr. Parker held under an indenture of lease for a term to expire at Michaelmas, 1869, and the particulars of sale had so stated, and that the subject-matter of the sale was the reversion from Michaelmas, 1868, there can be no doubt that a vendee would be considered as purchasing all the rights of the reversion as from Michaelmas, 1868. If in such a case the lease should contain a covenant by the tenant to leave the fodder on being paid fodder value, the right to have the fodder so left would be one of the rights which the vendee contracted to purchase.

It is not necessary that the vendee should know the terms of the lease. By buying the reversion described as expectant on a particular ascertained lease, he contracts for the rights and liabilities which that lease attaches to the reversion. Possibly if the lease were to contain extraordinary or onerous covenants to be performed by the reversioner, they would, if not disclosed, entitle the vendee to some relief in equity, or to resist a bill filed for specific performance. No such question arises, however, in the present case, as the terms are the ordinary terms of an agricultural tenancy. With respect to the rights which the vendee of a reversion purchases, I see no difference between the case of a 433] *reversion expectant on a term created by a lease under seal, and one created by parol. The vendee in either case purchases the reversion with the rights which the terms of the existing tenancy give to the landlord. One of these terms in the present case was that the tenant should leave the hay, &c., at fodder value for the benefit of the landlord.

Assuming the conclusion I have thus far arrived at to be correct, the next question which arises is, can the plaintiff recover from the defendants the amount paid by the plaintiff to the tenants at the expiration of their tenancies in September, 1869, as the market value of the hay, straw, and manure, which considerably exceeded the fodder value of the same?

It was argued that the plaintiff paid this in his own wrong, for that if it is conceded that the agreement of May, 1868, was personal only with the landlord, and did not affect the

terms of the tenancy, any right acquired under it would be binding only on the original landlord, and not on the plaintiff as his vendee and assignee. It seems to me, however, unnecessary for the decision of this case to further consider this part of it, for it is clear that the plaintiff would be in great practical difficulty had the tenants insisted on carrying away their hay, &c., unless they were paid market value, and that this would be in derogation of the rights which as between vendor and vendee the latter was entitled to, and was a matter which ought therefore to have been disclosed, and failing this, the vendor ought in all fairness to make good any loss which the purchaser might sustain thereby. Hence a question arose between the solicitors of the plaintiff and defendants, and, after some correspondence, the agreement of the 6th of January, 1869, was drawn up and signed, whereby it was agreed that the plaintiff should settle the purchase without prejudice to the claim made by him for an indemnity. Further, in June, 1870, one of the tenants, Mr. Parker, having brought an action against the plaintiff to recover the market value of hay, &c., left by him on his farm, it was arranged that if the plaintiff paid the amount claimed and taxed costs, the defendants would regard it as if it had been recovered by verdict.

The result of all this, in my opinion, is that the plaintiff and defendants agreed in substance that the purchaser's rights were *not to be in any way prejudiced by the [434 completion of the purchase and the settlement of the action, and that if the defendants as vendors ought to bear the difference between fodder and market value, they would do so. Ought they, then, to bear this difference? The tenant's right to market value was a special and unusual right beyond what arose from the custom of the country, and therefore one which the vendee was not bound to know of; and that right being created by the vendor for his own benefit, he ought to have disclosed it, and not having done so, the result of the arrangement between the plaintiff and the defendants was, that the latter were to make good to the former any loss that might arise from the existence of that right.

For these reasons the plaintiff's cause of action is, in my opinion, well founded, and the judgment of the court below ought to be reversed, and judgment entered for the plaintiff.

BLACKBURN, J., delivered the judgment of himself, Mellor, J., and Cleasby, B.:

As this is a court of error, and the decision will be binding till reversed by a higher court, I wish to confine my judg-

1875

Phillips v. Miller.

ment to the one point on which I think the court below were wrong. At present I am not prepared to differ from the court below on any other point, but it is not necessary, in the view I take of the case, to decide more than this one. I therefore desire, as far as my judgment goes, to leave the judgment below neither affirmed nor shaken by the decision of the court in error, on any point but that one; and for the same reason I wish neither to express assent to, nor dissent from, the other points discussed by my Brothers Pollock and Amphlett, whose judgments I have perused and considered.

The point on which I differ from the court below is as to the construction of the three agreements of the 11th of May, 1868, made between the vendors and the tenants of the property, afterwards sold to the plaintiff. Before the time for completing the purchase the plaintiff became aware of the existence of those agreements, and required security against any loss which he might sustain in consequence of their existence, if he completed the purchase. The result was an agreement set out in the 12th paragraph of the case.

435] *I think this agreement amounts to a request from the vendors (the defendants) to the plaintiff, to pay to the tenants the market value instead of the fodder price, on the terms that he should be repaid by the defendants the difference between those two prices if the eminent queen's counsel to whom the question was to be referred should decide that the vendors, and not the purchaser, ought to pay that sum to the tenants.

The reference went off, and the court therefore has to decide that question. If it is decided in favor of the plaintiff, he is entitled to a judgment in his favor for money paid to the defendants' use at their request, the amount of which must be determined by arbitration.

The reason why I think that the vendors ought to have paid that sum is that I construe the agreements of the 11th of May, 1868, as personal contracts between the tenants and (their then landlords) the defendants, binding the latter personally; not as leases binding the land or reversion, or affecting the rights or obligations of the tenants to the plaintiff, who subsequently purchased the reversion.

My reasons for this opinion are as follows:

Before the service of the notices to quit in April, 1868, all three farms were held under the defendants, as devisees for sale, on tenancies from year to year, terminable by notice to quit, on the terms, amongst others, that at the termination

of the tenancy the hay and straw should be left at fodder value.

On the service of the notices to quit, these tenancies became tenancies for a fixed period, terminating on the 29th of September, 1869.

The owners of the reversion and the tenants might, if they pleased, agree on fresh demises or (which would have the same effect) by mutual consent cancel the notices to quit; but unless both came to a fresh agreement of some sort, the existing tenancies would expire on that day.

It appears that the tenants alleged that the devisees' testator had promised them leases of their respective farms. There is nothing stated in the case that could make these alleged promises binding on the devisees, either at law or in equity, and we must therefore conclude that they were not binding; but, from the *conduct of the parties, it ap- [436
pears that the devisees thought them binding in honor and justice, and accordingly they entered into the agreements of the 11th of May, 1868.

If those agreements amounted to fresh demises, the acceptance of them by the tenants would operate as a surrender by operation of law of the old tenancies and the creation of new tenancies, determining on the same day, viz., the 29th of September, 1869; in which case the land would be bound, and the now plaintiff, who in the interval became purchaser of the reversion, took it subject to those new tenancies. Perhaps in that case the purchaser of the reversion would not be bound to take the hay and straw at market value, but at least he would not be able to force the tenants to leave it at fodder value. But if the agreements were not fresh demises, but merely contracts binding the devisees personally, the old tenancies remained in force, and the rights and obligations of the tenants to them and the plaintiff, as purchaser of the reversion subject to the old tenancies, were not in any way affected or bound by the personal contract of the devisees from whom the plaintiff purchased.

This point was not overlooked in the court below, for in the judgment it is said: "The arrangements with the tenants seem to us, upon the true view of them, not to be as to the question of market value, collateral agreements, nor unspecified claims and incumbrances, but really terms of the holdings of the tenants and incident to those holdings." The reasons for this opinion are not given. On the full consideration which I think I am bound to give before differing from the opinion of the Court of Common Pleas, I cannot agree in it.

I will, like my Brother Amphlett, take the agreement with Parker, the principal tenant, as a sample, and consider it.

The object and purpose of the parties was to give to the tenants compensation for the breach by the devisees of the honorary engagement of their testator, a personal act on the part of the devisees done by them with a view to a sale. Such an object would, most naturally, be carried out by giving compensation before the sale, or by binding themselves personally to pay compensation after the sale. It would be rather baffled by anything affecting the estate in the hands 437] of the purchasers. There is one *promise to do three things, to remit the half year's rent due at September, 1868, to pay £100, and to allow market value for the fodder. As far as regards the remission of the half year's rent becoming due at September, 1868, and the payment of £100, the promise is clearly personal only, and does not affect the land. And it seems to me that *prima facie* the promise, which is in part personal, is personal in the whole. If there was anything to indicate an intention to make it bind the land in part, I agree that the intention should prevail, but I do not see anything so to do.

The devisees had in contemplation a sale of the property; they had already prepared conditions of sale in which, of course, no notice was taken of the agreements of the 11th of May, not then yet made. And though it appears that the auctioneer verbally mentioned them at the time when the property was bought in, they afterwards sold under these conditions to a purchaser, who had at the time of his purchase no notice of those agreements. I am inclined to agree with the court below, that if these agreements did constitute demises, the failure to give notice of them would not, in the absence of fraud, give the plaintiff any cause of action, and certainly I am not prepared to reverse their judgment to that effect; though, as I stated before, I prefer to leave it neither affirmed nor reversed. But I think that the very object and wish of the devisees must have been that the agreements should be made so as not to affect the purchaser, and that the sale should go on just as if the agreements had never been made; though they themselves would give the tenants compensation for the breach by them of the tenants' claim to have a lease; a claim which they thought good in honor and conscience, though not enforceable. My Brother Amphlett says that, in the event of the devisees dying before the 29th of September, 1869, the construction for which I now argue would have made the tenants' claim for the differ-

ence between market and fodder value, as well as for the £100, be against their executors and not against the heir. I agree that if it does not bind the land this consequence follows; but I am far from thinking this a *reductio ad absurdum*. I think it was not wished to make it bind the land. My Brother Pollock has, in his judgment, well expressed the reasons for thinking that the words used in the agreement carry out the real intention and do not bind the [438 land. This view of the agreement renders it unnecessary to consider the more technical question, to what extent the terms of a demise not under seal would affect a purchaser of the reversion. I do not mean to express any dissent from what my Brother Pollock says, but merely to say that I am unwilling unnecessarily to enter on that question in a court of error; and I think it unnecessary so to do as I think this agreement was not a demise, and, consequently, I think that the question intended to have been submitted to Sir R. Palmer ought to be decided in favor of the plaintiff.

The judgment, therefore, in my opinion, should be reversed. The amount (if the parties cannot agree on it) to be ascertained by a reference.

BRAMWELL, B., concurred with the judgments of Blackburn, J., and Pollock, B.

Judgment reversed.

Attorneys for plaintiff: *C. J. Allen & Son.*

Attorneys for defendant: *Ranken, Ford & Co.*

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXVIII VICTORIA.

[Law Reports, 10 Exchequer, 35.]

Dec. 2, 1874.

[IN THE EXCHEQUER CHAMBER.]

35] *BAXENDALE and Others v. LONDON, CHATHAM and
DOVER RAILWAY COMPANY.

Damages—Recovery of Costs of Litigation—Separate Contracts—Proximate Cause.

H. having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, the plaintiffs contracted with the defendants for the carriage by the defendants of the pictures over a part of the distance. The pictures were damaged on the journey by the defendants' negligence. H. thereupon brought an action against the plaintiffs, who gave notice of it to the defendants, and requested them to defend it. The defendants refused, and told the plaintiffs to take their own course. The plaintiffs defended the action brought against them by H. without success, and then brought an action against the defendants to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defence. The defendants paid the damages into court, and disputed their liability as to the costs:

Held (reversing the judgment of the court below), that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the defendants' default, the contracts between H. and the plaintiffs, and between the plaintiffs and the defendants having been separate and independent. *Mors Le Blanch v. Wilson* (Law Rep. 8 C. P., 227; 5 Eng. Rep., 286) (Lush, J., dissenting), disapproved.

APPEAL from a decision of the Court of Exchequer, discharging a rule to enter a verdict for the defendants.

The facts of the case are as follows: On the 6th of October, 1871, Robert Harding delivered to the plaintiffs, who are

carriers and forwarding agents, a case containing two pictures for transmission to Paris; and at the same time his agents filled up and signed a foreign declaration and consignment note, in which the value of the pictures was stated to be £1,000. On the same day, the plaintiffs delivered the case to the defendants to be forwarded to their agents at Calais. A consignment note was signed by the plaintiffs, describing the goods as "one case pictures, value £1,000." This consignment note was subject to various conditions, exempting the defendants from liability in certain contingencies, which however did not happen. The case was forwarded by the defendants and reached Dover safely; but in course of shipment was, through the negligence of their servants, dropped into the sea and the pictures were damaged by sea water. The defendants having informed the plaintiffs [36 of the accident, the plaintiffs on the 11th of October, wrote them as follows: "The senders of the goods have been to examine them, and state that the pictures are utterly spoiled and the amount given in the declaration does not near cover the value thereof, and a claim will be made. We are afraid you are not, under the circumstances, protected by the Carriers Act for the damage done, and we shall be glad to know if you will accept the claim, or what you intend doing in the matter." The defendants, on the 24th, replied, declining all liability. On the 28th of November Harding made a claim of £1,000 on the plaintiffs, who refused to entertain it, on the ground that the pictures had not been insured in accordance with the Carriers Act. He thereupon commenced an action against them, and they wrote to the defendants on the 12th of December, informing them of the fact in these terms: "A writ has now been issued: will you kindly inform us whether you will defend by your own solicitors, or if you wish us to do so on your account? It would be a great mistake to have two actions: one against us and then another against you." Not having received any answer, on the 15th of December the plaintiffs again wrote, "requesting instructions," and on the same day the defendants' attorney wrote: "I am unable to give you any instructions, but must leave you to deal with the case as you think fit. I am not aware whether, when the case of pictures was delivered to you for carriage, a declaration was made and insurance paid. This company received it only as an ordinary parcel." On the 8th of January, 1872, declaration was delivered in *Harding v. Baxendale and others*, and on the 13th of January the plaintiffs forwarded a copy of it to the defendants' attorney, again requesting the defendants to undertake the defence or, if

1874

Baxendale v. London, Chatham and Dover Railway Co.

not, to make any suggestion as to the defence which should be raised. They added, "The defendants will hold your clients responsible for the damages which the plaintiff may be held entitled to recover as well as for the costs which the defendants may incur to the plaintiff and to their own solicitor in defending the action." The defendants' attorney replied on the 16th of January, declining to offer any suggestions as to the defence of the action.

The plaintiffs continued to defend the action, although they received, whilst it was still pending, an opinion from their 37] counsel *that the Carriers Act afforded no defence, and that they would not be successful.

They pleaded the general issue, liberty being given them by a consent order to raise, under this plea, the defence that they had received the goods as mere forwarding agents, and also that they were protected by the Carriers Act.

A part of the expenses incurred related to special defences set up by them and the remainder to the value of the pictures. Upon receiving notice of trial they again communicated with the defendants, who however continued to decline to make any suggestion as to the defence. The plaintiffs having delivered their briefs were again advised that the Carriers Act afforded no defence. They wrote on the 19th of June, 1872, to inform the defendants of the unfavorable opinion they had received, and asked whether they should endeavor to settle the action. The defendants' attorney replied, "I cannot, under the circumstances of the case, take any course implying assent on the part of the company to the settlement of the action, as they are prepared to defend any proceedings against them on the question of legal liability."

The cause of *Harding v. Baxendale and others* was tried in November, 1872, and resulted in a verdict for the plaintiff for £650. The plaintiffs' costs were taxed at £248 13s. 4d., which, with the damages, the plaintiffs paid to Harding. The plaintiffs' own costs amounted to £260 4s. The present action was brought to recover from the defendants £650 and the costs incurred by the plaintiffs in the defence of the former action. The defendants paid £650 into court, and denied liability as to the costs.

The cause was tried at the Surrey Spring Assizes, 1873, before Cockburn, C.J., when the above facts were admitted and a verdict entered for the plaintiffs for the amount of the two bills of costs in addition to the £650, with leave to move to enter a verdict for the defendants, or to reduce the damages to an amount to be settled by the master. A rule was afterwards obtained accordingly.

June 13, 1873. *Watkin Williams, Q.C.*, and *Murphy*, showed cause. They relied on *Mors le Blanch v. Wilson* ⁽¹⁾ on the *question of the plaintiffs' right to recover the [38 costs. The plaintiffs took under the circumstances a reasonable course in defending the action. It was true they had been advised that the Carriers Act was no defence, but as they knew the defendants intended to rely upon it they were justified in setting it up. Moreover, they were bound to incur some expense in having the damages ascertained.

Day, Q.C., and *W. G. Harrison*, supported the rule, and contended, first, that the contracts between the plaintiffs and Harding, and between the plaintiffs and defendants, being entirely distinct, the costs incurred in defending Harding's action could not be considered as in any sense the natural consequence of the defendants' breach of contract; and, secondly, that the plaintiffs had not taken a reasonable course under the circumstances.

Cur. adv. vult.

June 27. The judgment of the court (Bramwell and Cleasby, BB.), was delivered by

CLEASBY, B.: This was one of those cases in which a person incurs a responsibility in consequence of the neglect or default of another in some duty owing to him, and a question of some difficulty arises in it as to how far he can make that other responsible for costs he has incurred in defending an action brought against him.

It appears that the plaintiffs had received from Harding two pictures to be forwarded to Paris. They delivered them to the defendants, by whose negligence the pictures fell into the water and were damaged. A claim was then made against the plaintiffs by Harding, and an action brought by him against them. Now, in the first instance, the plaintiffs could obtain very little information to guide them, either in defending the action or in settling it. They could not pay money into court, for the damage done by the water to the pictures was difficult to ascertain without a regular inquiry by persons competent to deal with the matter. Having regard to the nature of the claim, we certainly think they could not be expected either to settle the claim before action or to pay money into court; and we think it was the necessary consequence of the defendants' neglect that the plaintiffs should be put to the expense of ascertaining in a proper way the amount of their *liability to Harding, in order [39 that they might recover over against the defendants. So far,

(1) Law Rep., 8 C. P., 227.

1874

Baxendale v. London, Chatham and Dover Railway Co.

therefore, as regards the part of the rule which asks that the verdict should be entered for the defendants, we think it should be discharged; for clearly the plaintiffs were entitled to some costs.

Then the question arises whether this was a case in which the plaintiffs acted fairly and reasonably in defending to the end the action brought against them by Harding; and in considering this question we think we ought to abide by the rule laid down, or rather, I should say, acted upon, in *Mors le Blanch v. Wilson* ⁽¹⁾, according to which a jury are to give such costs as were reasonably incurred by the plaintiffs in the action brought against them, either in defending the action or otherwise ascertaining the amount of liability. I have already called attention to the nature of the case; I will proceed to consider the conduct of the present defendants in reference to the claim. As soon as it was made the now plaintiffs wrote to the defendants giving them notice, and asking for their advice and assistance. A long correspondence ensued, and eventually the defendants declined all liability in the matter, and left the plaintiffs to take their own course. Still the plaintiffs continue to urge the defendants to do something, and on the 12th of December write: "A writ has now been issued. Will you kindly inform us whether you will defend by your own solicitor, or if you wish us to do so on your account? It would be a great mistake to have two actions—one against us, and then another against you." Unfortunately this is what has taken place, but certainly through no fault of the plaintiffs. The defendants continued to keep them at arm's length, and insisted that, if necessary, they would avail themselves of the protection of the Carriers Act. The result is, that the plaintiffs did all they could to prevent two sets of costs from arising; and it appears to us that the fault having been that of the company, they might fairly and properly have taken on themselves the defence of the action brought by Harding. Instead of doing so, they left the plaintiffs to make the best of the case they could.

Under these circumstances, the result is that the plaintiffs 40] are *entitled to recover from the defendants all costs incurred in having the amount of their liability ascertained, and also all costs attributable to the defence raised under the Carriers Act. They are not entitled to the costs of any defence peculiar to themselves—such as that they were mere forwarding agents and not carriers. It is true that we think the defence, under the Carriers Act, could not be success-

(1) Law Rep., 8 C. P., 227.

fully set up; but still we are of opinion that it was quite justifiable on the plaintiffs' part, not only to have the amount of liability established by a jury, but also to put forward the Carriers Act as a ground of defence, as the defendants to the last insisted upon it. We cannot deal with the figures. but with the guide we have given, the parties ought to be able easily to settle the amount.

Rule discharged.

From this decision the defendants appealed.

Déc. 1, 2. *W. G. Harrison* (Day, Q.C., with him), for the defendants, contended that the costs incurred by the plaintiffs in *Harding v. Baxendale* were not the natural consequence of the defendants' act. The contracts between the plaintiffs and Harding and between the plaintiffs and defendants, were entirely distinct. [He was stopped.]

W. Williams, Q.C. (*Murphy*, Q.C., with him), for the plaintiffs: The plaintiffs were bound to incur some expense in ascertaining the real amount of their liability to Harding. They might, it is true, have let judgment go by default; but having regard to the defendants' conduct and insistence that the Carriers Act was a defence, they were not acting unreasonably or improperly in defending the action. The defendants throughout appear to have thought that the Carriers Act was a defence, probably on the ground that although a declaration of value was made no increased rate of charge was paid: see, however, *Behrens v. Great Northern Ry. Co.* (*). The costs incurred were, therefore, the legitimate consequence of the defendants' breach of duty; and the case of *Mors le Blanch v. Wilson* (*) is strictly applicable. There, as here, there were two contracts.

*[QUAIN, J.: That case proceeded upon a *dictum* of [41 Parke, B., in *Tindal v. Bell* (*).]

The principle of the case is a sound one wherever a claim for unliquidated damages is preferred which requires investigation. He also cited *Rolph v. Crouch* (*); *Ogle v. Earl Vane* (*); Mayne on Damages, 2d ed., by Lumley Smith, p. 43.

LORD COLERIDGE, C.J.: In this case a claim is made against the defendants for the costs incurred by the plaintiffs of an unsuccessful defence offered by them to an action brought against them by one Harding. It appears that the plaintiffs contracted with Harding to send two pictures for him from London to Paris; and that afterwards, by a sepa-

(*) 7 H. & N., 950; 31 L. J. (Ex.), 299.

(*) Law Rep., 8 C. P., 227.

(*) 11 M. & W., 228, at p. 231.

(*) Law Rep., 3 Ex., 44.

(*) Law Rep., 2 Q. B., 275; Law Rep.,

3 Q. B., 272.

1874

Baxendale v. London, Chatham and Dover Railway Co.

rate and independent contract, the defendants agreed with the plaintiffs to carry the pictures. In the course of the transit, through the defendants' negligence, the pictures fell into the sea and were damaged. Harding thereupon brought an action against the plaintiffs, who took legal advice, and were told, and rightly told, that they had no defence. The plaintiffs communicated this fact to the defendants, and a long correspondence ensued, the substance of which was that the defendants said to the plaintiffs, "Take your own course in Harding's action. We will have nothing to do with it. When the time comes for you to attack us we shall defend ourselves." The plaintiffs, however, persisted in defending Harding's action, and it went to trial. The plaintiffs were defeated, and then commenced this action, in which they sought to recover from the defendants, not only the damages assessed by the jury as the value of the pictures, but also the cost of their unsuccessful defence. The defendants paid the damages for the injury to the pictures into court, and denied any further liability. The Court of Exchequer have decided upon the authority of *Mors le Blanch v. Wilson* ⁽¹⁾ that they are liable to those costs, or, at all events, to so much of them as were incurred by the plaintiffs in ascertaining the amount of their liability to Harding, and in relation to the defence of the Carriers Act. 42] I am of opinion that this decision is *erroneous. The defence was not, in my judgment, a reasonable defence. It was without any foundation in law, and there was no authority from the defendants, either express or implied, to set it up.

This, however, does not dispose of the whole of the plaintiffs' claim. For it may be said "True, the defence was ill-advised and unauthorized; still the plaintiffs were obliged to do something to ascertain their liability, and they at least are entitled to such an amount of costs as they would have incurred had they allowed judgment to go by default, upon a writ of inquiry." But I think this contention fails also, because it seems to me that the whole of the costs were incurred for the plaintiffs' own benefit, and were not in any sense the natural and proximate result of the defendants' breach of duty. The judgment, therefore, must be reversed. It appears to have proceeded wholly upon the case of *Mors le Blanch v. Wilson* ⁽¹⁾, which is certainly very like this case, and which, if necessary, should in my opinion be overruled.

KEATING, J.: I am of the same opinion. I think the

⁽¹⁾ Law Rep., 8 C. P., 227.

damages here sought to be recovered are too remote. The contract between Harding and the plaintiffs is wholly separate from that between the plaintiffs and defendants, and any costs incurred by the plaintiffs in defending an action by Harding on his contract cannot be regarded as the natural and proximate result of the defendants' breach of duty. A different question might have arisen supposing the defendants had requested the plaintiffs to defend, for in that case these costs might, according to the principles which govern actions for money paid, and which will be found in the note to *Lampleigh v. Brathwait* (¹), have been recovered as money paid by the plaintiffs for the defendants at their request.

If the question here were whether the defence was reasonable or not, I must say that I think it was entirely unreasonable. But this would not dispose of the whole claim. For it might be asked, what were the plaintiffs to do? It has been suggested that they should have let judgment go by default, but that would touch the question of amount only, not of liability.

*In *Mors le Blanch v. Wilson* (²) it was left to the jury [43 in a very similar case to the present to say whether the plaintiff had adopted a reasonable course or not in defending an action for damage brought against him. I believe that in the opinion of my brother Lush that case is distinguishable from this one; but I feel great difficulty myself in seeing any distinction. I think, therefore, that in the court below Mr. Williams had a right to rely upon that case as authoritative, but I confess that the decision does not appear to me to be satisfactory. The ground of my present decision is, that the costs claimed are not the proximate consequence of the defendants' breach of duty.

LUSH, J.: I am of the same opinion; and my judgment proceeds upon the ground that the costs claimed are not the natural consequence of the defendants' breach of contract, nor were they incurred at their request or for their benefit. There were two separate contracts; one between Harding and the plaintiffs, and the other between the plaintiffs and the defendants. The defendants knew of no one but the plaintiffs in the matter; and it might well have been that the plaintiffs were liable to Harding on their contract, and yet that the defendants were not liable to the plaintiffs on theirs, or *vice versa*. Upon the action by Harding being commenced, the plaintiffs informed the defendants, who, on the 15th of December, replied that they were protected by the Carriers

(¹) 1 Sm. L. C., 6th ed., at p. 142.

(²) Law Rep., 8 C. P., 227.

1874

Baxendale v. London, Chatham and Dover Railway Co.

Act, and that they would have nothing to do with the defence of the action. This position they continued to maintain. The plaintiffs nevertheless defended Harding's action, but without success, and now claim their costs from the defendants as well as the damages (£650) which they had to pay Harding.

Now it should be observed, that the plaintiffs might have sued the defendants at once, when the measure of the defendants' liability would have been the injury to the pictures. The defendants' neglect was in not carrying the goods safely, and the plaintiffs, though themselves protected by their contract with Harding, might still have recovered against them. This, then, is not as the court below appear to have thought, a case "in which a person incurs a liability in consequence 44] of the neglect or default of another in *some duty owing to him." The defendants incurred no liability to Harding, and their liability to the plaintiffs was quite apart from any liability of the plaintiffs to Harding. The costs of defending Harding's action therefore cannot be said to be the consequence of the defendants' default. The two things have no connection whatever with each other.

But the court below also place their judgment upon the ground that it was reasonable that the plaintiffs should have the damages assessed in Harding's action. It may have been reasonable for their own benefit; but as the defendants could not be bound by the assessment, I do not see how it could be for theirs.

Again, we have been pressed with the difficulty in which the plaintiffs were placed; but as to that the difficulty arises from the nature and magnitude of their business, and ought not to influence our decision upon the question before us. It remains to add a few words with regard to *Mors le Blanch v. Wilson* (¹), upon which it appears that the court below acted. In my opinion there is no analogy between the two cases. In that case the amount of demurrage ascertained in the first action would necessarily be the measure of damages in the second; and, moreover, there the jury expressly found that the plaintiff had adopted a reasonable course in defending the first action. I think, therefore, that our decision in this case is not really in conflict with that of the Court of Common Pleas.

QUAIN, J.: If this were a contract of indemnity where, although there may be two contracts in form, there is only one in substance, our decision might be in favor of the plaintiffs. In such a case, a surety who is called upon to pay the

(¹) Law Rep., 8 C. P., 227.

debt due or owing from the principal may well be justified in defending an action at the principal's expense. The cases which have been referred to, with one exception, are all cases of indemnity, and really have no application here. For we have to deal with two separate and independent contracts, and it would, it seems to me, be very unreasonable to hold that the plaintiffs should be able to charge the defendants against their will and without their sanction with the costs of an action brought upon a contract made by the plaintiffs *with Harding, to which the defendants were no parties [45 and with which they had no concern whatever.

This case, then, is not one of principal and surety; and the only ground on which the plaintiffs can recover these costs is, that the costs are the natural and reasonable consequence of the defendants' breach of contract, and therefore within the well-known rule laid down in *Hadley v. Baxendale* ⁽¹⁾. But I am clearly of opinion that they cannot be so considered. If the defendants had chosen to undertake the defence, then no doubt an action for money paid would have been maintainable upon the principle of the cases cited in the note to *Lampleigh v. Brathwait* ⁽²⁾. But the evidence here is that, from first to last the defendants refused to have anything to do with Harding's action.

With regard to *Mors le Blanch v. Wilson* ⁽³⁾, that is, I think, an authority for the plaintiffs. I am unable to distinguish it from this case. There, as here, there were two separate and independent contracts; and I do not think, with deference to my Brother Lush, that the assessment of damages against Mors le Blanch was conclusive in his action against Wilson. But sitting here we are not bound by that case, which appears to have proceeded upon a mere *dictum* of Parke, B., in *Tindal v. Bell* ⁽⁴⁾. I agree with my Lord and my Brother Keating in thinking it wrongly decided.

ARCHIBALD, J.: I am of the same opinion. These costs cannot be claimed by reason of the defendants having given any actual authority to incur them. Nor were the plaintiffs compelled to incur them by reason of the defendants' default. In other words, they were not the natural and necessary consequence of that default. The contracts were wholly independent, and the damages recovered against the plaintiffs by Harding were not of necessity the same as those which the plaintiffs could recover against the defendants. The assessment in the first action could not in any shape be conclusive against the defendants.

⁽¹⁾ 9 Ex., 341; 22 L. J. (Ex.), 179.

⁽²⁾ 1 Sm. L. C., 6th ed., at p. 142.

⁽³⁾ Law Rep., 8 C. P., 227.

⁽⁴⁾ 11 M. & W., at p. 231.

1874

Baxendale v. London, Chatham and Dover Railway Co.

46] *With regard to *Mors le Blanch v. Wilson* (1), I cannot see any distinction between it and the present case. My Brother Lush has pointed out what he considers to be a distinction; but I cannot see why, in that case, the damages assessed against Mors le Blanch furnished a conclusive test of those which he could recover against Wilson. There, as here, the contracts were separate and independent, and Mors le Blanch might have sued Wilson before he had been sued himself, and so have settled the question of demurrage, just as here the plaintiffs might at once have sued the defendants. If, therefore, it be necessary to pronounce an opinion as to *Mors le Blanch v. Wilson* (1), I should hold it open to the same objection as the decision of the court below in this case.

Judgment reversed.

Attorneys for plaintiffs: *Upton, Johnson & Co.*

Attorney for defendants: *T. C. Church.*

(1) Law Rep., 8 C. P., 227.

In an action by an execution creditor against a high sheriff for the failure of his deputy to pay over money made on the execution, the deputy is present at the trial and examined as a witness, but there is a verdict and judgment for the plaintiff. In a subsequent action by the high sheriff against the deputy and his sureties on their bond, with condition to indemnify the high sheriff from all loss and damages from the conduct of the deputy in said office, the judgment against the high sheriff, in the absence of fraud and collusion, is conclusive evidence of the default of the deputy against not only the deputy but also his sureties: *Crawford v. Turk*, 24 Grattan (Va.), 176. See also *Wright v. Whiting*, 40 Barb., 240. See *Snyder v. Reno*, 88 Iowa, 329.

So a servant who has notice of a suit against the master for his acts: *Grand Trunk v. Latham*, 63 Maine, 177, 180. But see *Lansing v. Sherman*, 80 Mich., 49.

A landlord is not bound by a judgment in ejectment against his tenant, unless he had notice of the pendency of the action and an opportunity to defend in the name of the tenant: *Chant v. Reynolds*, 49 Cal., 213.

Nor is the covenantee bound when not allowed, after an adverse judgment, to pay the costs and take a new trial as provided by statute: *Eaton v. Lyman*, 26 Wisconsin, 61.

A party so notified is not bound by the judgment unless allowed the absolute control of the action: *Saveland v. Green*, 36 Wisconsin, 612.

In an action to recover damages for the breach of a warranty of title of a horse sold to the plaintiff by the defendant, proof that the horse was taken from the plaintiff on a writ of replevin four months after the sale, at the suit of a third person, together with a transcript of the record of such replevin suit, which shows that such suit resulted in judgment for the plaintiff therein, but does not disclose upon what grounds the judgment was obtained, in the absence of any proof that such judgment depended at all upon the state of the title at the time of the sale, will not support a judgment for the plaintiff: *Moore v. Bostwick*, 23 Michigan, 507.

An officer, by order of A., attached goods on a writ in favor of A.; the owner of the goods sued the officer for taking them; A. assumed the defence of the suit, but verdict and judgment was rendered against the officer. Held, in an action by the officer against A., to recover the amount of the judgment, that A. was not estopped from showing that the verdict against the officer was rendered on account of his illegal conduct subsequent to the attachment, and on account of his proceeding on other

writes than that of A.: *Boynnton v. Merrill*, 111 Mass., 4.

One who is notified of a suit and offered the conduct of the cause is liable for the costs and counsel fees in such suit, incurred in the defence: *Grand Trunk v. Latham*, 63 Maine, 177. See 5 Eng. Rep., 299, note.

The question as to how far a surety who has been subjected to the payment of costs of a litigation may recover the costs of his principal, is one as to which there is some conflict.

The true rule would seem to be that a surety or other person who sues for indemnity may recover the costs of a suit on default, because it was the principal's duty, by payment, to relieve him from suit: *Holmes v. Weed*, 24 Barb., 546; *Burge on Suretyship* (1st ed.), 363; *Bleaden v. Charles*, 7 Bing., 246; *Roach v. Thompson*, *Moody & Malkin*, 487, and see *Fisher v. Fullows*, 5 Esp., 171; *Gillett v. Rippon*, *Moody & Malkin*, 406; *Wright v. Whiting*, 40 Barb., 240; *Wallace v. Gilchrist*, 24 Upper Canada C. P., 40.

If the surety or person indemnified knows the claim to be just and without defence he has no right, improperly, to interpose a defence and litigate the same. If he does so and fails in the suit, he cannot recover of his principal the costs paid by him: *Holmes v. Weed*, 24 Barb., 546; 1 *Smith's Leading Cases*, 228, marg. p.; *McClure v. Grafton*, 19 Upper Can. Com. Pl., 150-5, and numerous authorities cited.

Otherwise if he defend or prosecute in good faith and on probable grounds: *Burge on Suretyship*, 363 (1st ed.); *Ex parte Marshall*, 1 *Atkins*, 262; 1 *Smith's Leading Cases*, 228, marg. p.; *Wright v. Whiting*, 40 Barb., 240; *Caldbeck v. Boon*, *Irish Rep.*, 7 Com. Law, 32; *Snyder v. Reno*, 38 Iowa, 329; *Finckh v. Evers*, 25 Ohio St.

Rep., 82; *McClure v. Grafton*, 19 Upper Can. Com. Pl., 150-5, and numerous authorities cited.

Although it has been held the principal is not liable for the costs of supplementary proceedings: *Wright v. Whiting*, 40 Barb., 235.

In an action against a member of an association consisting of more than seven persons, after judgment and execution unsatisfied (*Laws 1853*, page 283), the costs of a suit against the association in the name of its president cannot be recovered: *Kingsland v. Braisted*, 2 *Lansing*, 18.

In New York it is provided by statute (*Laws 1858*, p. 506, § 3, 4 *Edm. St.*, 488) "That any indorser or other surety, and any assignee, executor, administrator, or other trustee, shall be allowed to recover from his principal or *cestui que trust*, all necessary and reasonable costs and expenses paid or incurred by him in good faith, as surety or trustee in the prosecution or defence in good faith of any action by or against any assignee, executor, administrator or other trustee as such." It will be seen that the word "surety" is omitted in the last clause of the last sentence. The omission, however, would not seem to affect the meaning or construction of the statute.

An agent for the collection of negotiable paper who fails to take the necessary steps to charge the indorsers thereof, is not liable to the owner for the costs of an unsuccessful suit by the latter against the indorsers, unless by some misrepresentation or other act, he induced the bringing of such suit: *Ayrault v. Pacific Bank*, 1 *Abb. Prac.*, N. S., 381.

See S. C. on second trial, 6 *Rob.*, 337, affirmed 47 *N. Y.*, 570.

See also *Pinkerton v. Sargent*, 112 *Mass.*, 110.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXVIII VICTORIA.

[Law Reports, 10 Exchequer, 47.]

Jan. 23, 1875.

47] *ARMSTRONG v. THE LANCASHIRE AND YORKSHIRE
RAILWAY COMPANY.

Negligence—Collision between Railway Carriages—Identification of Passenger with his Driver—Joint Wrongdoers.

The plaintiff, one of the travelling inspectors of the carriage and wagon department of the L. and N. W. Railway Company, was travelling under a pass from them, in one of their carriages, on a journey from Leeds to Manchester. Near C. Station, and on the line of the defendants, over which the L. and N. W. Railway had running powers, the train in which the plaintiff was travelling came into collision with a number of loaded wagons which were being shunted from a siding by the defendants, and he was injured. There was evidence of negligence on the part of the driver of the plaintiff's train in travelling at too great a speed, so as to be unable to stop when he came in sight of the danger signal, which had been hoisted by the defendants.

The jury found that the accident was caused by the joint negligence of the defendants and the L. and N. W. Railway Company:

Held, approving of the decision in *Thorogood v. Bryan* (8 C. B., 115), that the plaintiff was so far identified with the L. and N. W. Railway Company that he could not recover:

Semle, that the evidence did not support the finding of the jury with regard to the defendants, but showed that the L. and N. W. Railway were solely responsible for the accident.

DECLARATION that plaintiff was lawfully travelling in a train of carriages drawn by a locomotive engine lawfully
48] being and *running on a railway of the defendants, and the defendants so negligently conducted themselves in the control and management of their railway, and in keeping the same in proper order and condition, that the train of car-

riages in which the plaintiff was then travelling ran into and came into collision with a train of wagons and trucks of the defendants then standing and being on the railway, whereby the plaintiff was injured, &c.

Plea: not guilty. Joinder of issue.

At the trial before Archibald, J., at the Manchester Summer Assizes, 1874, it was proved that the plaintiff, one of the travelling inspectors of the carriage and wagon department of the London and North Western Railway Company, was in August, 1873, travelling under a pass from them in one of their trains from Leeds to Manchester. This train had to pass Clayton Bridge Station, which is on a branch of the defendants' railway, over which branch the London and North Western have running powers. Upon arriving at the station the train ran against some coal wagons which were being shunted from a siding by the defendants, and the plaintiff was seriously injured. There was evidence that the collision was owing to the driver of the train approaching Clayton Bridge distant-signal, on a hazy day and when the rails were slippery, at so high a speed that he was unable to stop when he came in sight of the distant-signal, which had been placed at danger by the defendants. He stated, however, that owing to the weather being hazy he was unable to see the signal until it was too late. The jury found that the collision was caused by the joint negligence of the London and North Western Company and of the defendants, and assessed the damages at £400. The learned judge directed a verdict for the defendants, with leave for the plaintiff to move.

A rule having been obtained accordingly, to enter the verdict for the plaintiff, upon the ground that upon the facts as proved and found by the jury, the judge was wrong in directing the verdict to be entered for the defendants,

Herschell, Q.C., and *Crompton* showed cause: The learned judge was right in directing the verdict to be entered for the defendants. *Thorogood v. Bryan* (1) is in point. There the plaintiff, a *passenger by an omnibus, was run over by [49 a second omnibus, of which the defendant was owner, and it was held that if the jury thought that want of care in the driver of the plaintiff's omnibus conduced to the accident, their verdict must be for the defendant, for the plaintiff must be taken to be identified with the driver of the omnibus in which he was passenger; and in the previous case of *Bridge v. Grand Junction Ry. Co.* (2) the Court of Exchequer appear to have held a similar opinion, in a case where a collision

(1) 8 C. B., 115; 18 L. J. (C.P.), 336.

(2) 3 M. & W., 244.

1875

Armstrong v. Lancashire and Yorkshire Railway Co.

had taken place between two railway trains. *Thorogood v. Bryan* (*) has never been overruled. It is true that in *The Milan* (*), a proceeding by the owner of cargo in a brig against a steamer with which the brig came into collision, Dr. Lushington declined to be bound by *Thorogood v. Bryan* (*), and said that he disapproved of it. But the learned judge practically followed the decision, for, considering that both ships were in fault, he directed the steamer to pay according to Admiralty practice, half the damage to the plaintiff, and thereby he identified the owner of the cargo with the owner of the ship in which it was carried. At common law the passenger is identified with the carrier. In *The Milan* (*) the owner of the cargo is identified with the shipowner. *Thorogood v. Bryan* (*) is also criticised in the note to *Ashby v. White* (*). But a mere opinion ought not to avail against a decision which has always been followed.

[BRAMWELL, B.: There might be a case in which a person was unable to get out of the way of two omnibuses owing to the misconduct of the drivers. He might sue either, but I think he would have to allege that the accident was caused by the negligence of the defendant and the driver of another omnibus.]

In *Waite v. North Eastern Ry. Co.* (*), where a child was injured partly by the negligence of its grandmother, in whose care it was, and partly by the negligence of the company, Williams, J., expresses his opinion that there was an identification between the child and the person in charge of it, and evidently treats *Thorogood v. Bryan* (*) as settled law. 50] Secondly, the finding of the jury *is not consistent with the facts proved at the trial. Admitting that the defendants might be liable to the plaintiff for some misfeasance on their part, they cannot be liable for a mere non-feasance in leaving some wagons on their line, which would have caused no harm, but for the carelessness of the London and North Western train in not observing the danger signal. If there had been due care on the part of the London and North Western the accident would never have happened. The jury say that the defendants were guilty of negligence, but they merely gave an opportunity to some one else to be negligent. [They also referred to *Davies v. Mann* (*) ; *Rigby v. Hewitt* (*) ; *Wright v. Midland Ry. Co.* (*)]

Pope, Q.C., and *G. B. Hughes*, in support of the rule: The plaintiff is entitled to the verdict. In the first place,

(1) 8 C. B., 115; 18 L. J. (C.P.), 336.

(*) E. B. & E., 719; 28 L. J. (Q.B.), 258.

(2) Lush. Adm., 388; 31 L. J. (P. M. & A.), 105.

(*) 10 M. & W., 546.

(3) 1 Sm. L. C., at p. 266, 6th ed.

(*) 5 Ex., 240; 19 L. J. (Ex.), 291.

(*) Law Rep., 8 Ex., 137.

Thorogood v. Bryan (¹), assuming it to be rightly decided, is distinguishable. There there was contributory negligence on the part of the plaintiff himself in getting out of the omnibus in the middle of the road, instead of at the curb. But the soundness of the decision has always been questioned. The statement that the passenger is "identified" with the driver is surely inaccurate. Where is this identification to stop? Why may not the passenger be liable in an action for the driver's negligence?

[POLLOCK, B.: The identification does not involve any volition on the part of the passenger. It merely means that he has equal rights with the driver.]

Besides the doubts expressed by Dr. Lushington in *The Milan* (²), and by the editors of Smith's *Leading Cases* in *Ashby v. White* (³), Williams, J., in *Tuff v. Warman* (⁴), speaks of the case as having been criticised, and the fact is also mentioned in Manley Smith on Master and Servant, 3d ed., p. 281. In America, it appears from Shearman & Redfield on Negligence, 2d ed., p. 53, s. 46, to be held that where the negligence of any other person is imputed to the plaintiff, it must appear that such person was the plaintiff's agent in the transaction, and either that he was under the plaintiff's *control, or that he controlled the plaintiff's [51] personal conduct: and the cases of *Eaton v. Boston and Lowell Ry. Co.* (⁵), and *Webster v. Hudson River Ry. Co.* (⁶), are referred to, which fully support the proposition. Where the driver is the plaintiff's servant or agent, there may be no remedy. But in the case of a railway train, omnibus, or public conveyance, the passenger has no voice in the selection of the driver.

BRAMWELL, B.: I think this rule must be discharged. It is impossible to distinguish the case from *Thorogood v. Bryan* (¹), except in one particular, which is in the defendants' favor. It must not be supposed, so far as my opinion is of any value, that I am at all dissatisfied with *Thorogood v. Bryan* (¹). Mr. Pope admits that if his contention is right, the owner of a bale of goods carried by the defendants, and damaged by an accident similar to this would be entitled to maintain an action, also that if a carriage had been lent by the owner, and injured by the joint negligence of the driver and a third person, the owner could sue such person for the damage. It seems to me that these are startling propo-

(¹) 8 C. B., 115; 18 L. J. (C.P.), 336.

(⁴) 2 C. B. (N.S.), at p. 750; 26 L. J.

(²) Lush. Adm., 388; 31 L. J. (P. M. & A.), 105.

(C.P.), 265.

(³) 1 Sm. L. C., at p. 266, 6th ed.

(⁵) 11 Allen Rep., 500.

(⁶) 38 New York Rep., 260.

sitions. Then there is another difficulty. If this action is maintainable, in what sense are the defendants joint wrongdoers with the London and North Western Company? Can there be a joint liability with regard to the negligence, or breach of duty to the plaintiff, and no joint liability with regard to the contract under which he was carried as passenger? Could another action be maintained by the plaintiff against the London and North Western Company? Suppose the plaintiff had been merely an ordinary passenger, could he first of all maintain an action against the London and North Western Company, which carried him, for breach of contract, and then another action against the Lancashire and Yorkshire Company, by whose negligence the coal wagons were left on the line? These are questions worthy of consideration. But in the present case there seems to be good reason why the rule in *Thorogood v. Bryan* (') should apply. The plaintiff cannot maintain an action against the 52] London and North *Western Company, because he was their servant, and yet it is said that he may maintain an action against another company who only contributed to the mischief, and were certainly not the proximate cause of it. It must follow, therefore, that while the servant of a railway company, in case of a collision, may sue what I may call the opposing company, he cannot sue the company who are the proximate cause of his injury. But I am prepared to decide this case on the authority of *Thorogood v. Bryan* ('), which has never been overruled. As I have said, I think it is distinguishable from this case in a point favorable to the defendants. And I think that upon this rule the defendants may avail themselves of the evidence at the trial, without being concluded by the finding, and although they have no cross rule. In assenting to the leave to move, the counsel for the defendant does not adopt the proceedings except so far as there is evidence to support them. The question whether there was evidence of negligence by the defendants must be considered to have been left open, and I think it might be put in this way: The defendants were possibly guilty of negligence, but was it negligence the consequences of which might have been avoided with reasonable care? It seems to me that upon the evidence the defendants might have brought an action for any damage sustained by their carriages against the London and North Western Company, and *Davies v. Mann* (') would be an authority in favor of the action.

(') 8 C. B., 115; 18 L. J. (C.P.), 336.

(*) 10 M. & W., 546.

POLLOCK, B.: I also think the rule ought to be discharged. It is sufficient to say that the case is not distinguishable from *Thorogood v. Bryan* (*), though it must not be supposed that I am dissatisfied with that decision. The only difficulty in it arises from the use of the word "identified" in the judgment. If it is to be taken that by the word "identified" is meant that the plaintiff, by some conduct of his own, as by selecting the omnibus in which he was travelling, has acted so as to make the driver his agent, this would sound like a strange proposition, which could not be entirely sustained. But what I understand it to mean is, that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver. This is *illustrated by the case of *Waite v. North Eastern Ry. Co.* (*), where it was held that a child, with regard to contributory negligence, was identified with its grandmother who accompanied it, though it was impossible to say that there was any selection of the companion, or any act of volition on the part of the child. Then, if the rule laid down by Parke, B., in *Bridge v. Grand Junction Ry. Co.* (*), "that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he is entitled to recover," be adhered to, it does not seem to me that there is any very great hardship on the plaintiff. He is in the same position as if he had been the animal injured in *Davies v. Mann* (*). He is entitled, notwithstanding the negligence of the driver of his own train, to recover against the defendants if they have been guilty of any such negligence as was proved in *Davies v. Mann* (*). It may be said, why should he not have a right of action against both companies? The answer is, he may have such an action against two tortfeasors, but there is no hardship in saying that if two independent persons are in a position somewhat hostile to each other, then the right to maintain a separate action against one may be an answer to an action brought against the other, for the plaintiff has to show that the negligence of the person whom he sues is the proximate cause of the accident.

Rule discharged.

Attorneys for plaintiff: *W. A. Holcombe, for T. E. Jones, Manchester.*

Attorneys for defendants: *Clarke, Woodcock & Ryland, for T. A. & J. Grundy & Co., Manchester.*

(*) 8 C. B., 115; 18 L. J. (C.P.), 336.

(*) 3 M. & W., 244, at p. 248.

(*) E. B., & E. 719; 28 L. J. (Q.B.), 258.

(*) 10 M. & W., 546.

1875

Armstrong v. Lancashire and Yorkshire Railway Co.

It has been held in the case of a passenger by a stage coach the negligence of the driver must be regarded as the negligence of a passenger; the driver represents the passenger who cannot recover if his negligence contributed to the injury. There is a difference in the methods of propulsion between a stage coach and a railway train which renders a different rule applicable: *Brown v. N. Y. Cent. R. R.*, 32 N. Y., 602-3.

It must be conceded that it is difficult to discover a reason for the difference. As on a charge at the circuit to the effect above stated the jury found the driver of the coach to have been free from negligence, and the case was affirmed in the Court of Appeals, the rule laid down at the circuit being more favorable than the defendant had a right to require, what was said upon this question was *obiter*. The later cases hold that a passenger by a public conveyance may recover for injuries negligently inflicted by a third person, though the carrier with whom he was riding was also guilty of negligence: *Barrett v. Third Avenue, etc.*, 45 N. Y., 628; *Spooner v. Brooklyn, etc.*, 54 N. Y., 230; *Webster v. Hudson River R. R.*, 38 N. Y., 262; *Sherman & Redf. on Neg.*, § 46, note 4; *Wharton on Neg.*, § 395; *Arctic, etc.*, v. *Austin*, 6 N. Y. Supreme Court Rep., 66, 3 Hun, 195; *Knapp v. Dagg*, 18 How. Prac., 165; *Bennett v. New Jersey, etc.*, 36 New Jersey Law, 225.

See also *Thomas v. Rhyne, etc.*, L. R., 5 Q. B., 226, affirmed in Exch. Ch., L. R., 6 Q. B., 268; *Tyrrell v. Eastern, etc.*, 111 Mass., 546; *Eaton v. Boston, etc.*, 11 Allen, 500; *Stiles v. Jersey*, 71 Penn. St. Rep., 439.

The cases of *Mooney v. Hudson River, etc.*, 5 Rob., 548; *Spooner v. Brooklyn, etc.*, 36 Barb., 217; *Thorough v. Bryan*, 8 M. G. & S., 115; *Catlin v. Hills*, Id., 123, cited 2 Greenleaf's Evidence, § 232 a, are clearly not sound law.

One riding with another has been held responsible for the negligence of the driver in Iowa: *Payne v. C. R.*, etc., 39 Iowa, 528.

A passenger by railroad is not so identified with the proprietors of the train conveying him, or their servants, as to be responsible for negligence on

their part. He may therefore recover against the proprietors of another train for damages from a collision through their negligence, though there was such negligence in the management of the train conveying him as would have defeated an action by its owners: *Chapman v. New Haven, etc.*, 19 N. Y., 341; *Webster v. Hudson River R. R.*, 38 N. Y., 260; *Colegrove v. New Haven, etc.*, 20 N. Y., 492.

The concurring negligence of the defendant and the person by whom the plaintiff was being carried gratuitously, will not prevent a recovery. Where plaintiff was riding gratuitously in A's carriage, and A. was driving at the time, and by a collision with defendant's wagon, driven by defendant's servant, plaintiff was thrown out and injured; Held, that the fact that the injury was caused by the joint negligence of A. and defendant's servant, would be no defence: *Metcalf v. Baker*, 34 N. Y. Superior Court Rep., 10; 11 Abb. Prac., N. S., 431, affirmed by Commission of Appeals, May 29, 1874, 57 N. Y., 602; *Robinson v. N. Y., etc.*, 65 Barb., 146, 154; *Sheridan v. Brooklyn, etc.*, 36 N. Y. Rep., 39.

A switch tender employed by a railroad company on a portion of its track, upon which it permits another company to run trains, is not a servant of the latter; and an engineer of the latter, injured by the negligence of such switch tender, may maintain an action against the switch tender's employer: *Smith v. N. Y., etc.*, 19 N. Y., 127; *McElroy v. Nashua, etc.*, 4 Cushing, 400.

It has been held that in case of a collision between a steamboat and a rowboat, where none of the persons in the latter stand in the light of either employer or employed to the other, each one is chargeable with negligence of his comrades as well as his own, *Beck v. East River, etc.*, 6 Rob., 82; but this case may be doubted where the injured person himself in no way contributed to the injury: *Arctic, etc.*, v. *Austin*, 6 N. Y. Supreme Court Rep., 63, 3 Hun, 195.

In *McCall v. N. Y. Cent. R. R.*, 54 N. Y., 642, the injured party was held to be chargeable with negligence of his own driver.

Though [the carrier with whom the

plaintiff was riding was guilty of negligence he cannot recover of another carrier inflicting the injury if the latter were free from negligence: *Wright v. Midland, etc.*, 5 Eng. Rep., 382; Wharton on Neg., § 895.

[Law Reports, 10 Exchequer, 54.]

Jan. 29, 1875.

*HEMMING V. BATCHELOR.

[54]

Practice—Death of Plaintiff after Nonsuit—Abatement of Action—Right of Defendant to enter Judgment nunc pro tunc—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 139—Rule 56 of Hilary Term, 1853.

In an action against the defendant for negligently allowing an area to remain open in a highway, whereby the plaintiff (an infant, suing by next friend), was injured, the case was tried after term, and a nonsuit directed, on the ground that there was no evidence of negligence; the judge staying execution to enable the plaintiff to move to set aside the nonsuit. During the vacation the plaintiff died. In the following term, the plaintiff's next friend obtained a rule nisi to set aside the nonsuit, on the ground that there was evidence of negligence, and the defendant a rule nisi to tax his costs, or why the court should not allow judgment to be signed for him *nunc pro tunc*;

Held, that the action having abated by the plaintiff's death, a motion to set aside the nonsuit could not be entertained. As however the judge by staying execution had intimated that he regarded the question as to the defendant's liability a doubtful one, judgment *nunc pro tunc* ought not to be entered for the defendant. The defendant's rule must be discharged, without costs, and the plaintiff's rule allowed to drop.

DECLARATION by plaintiff (an infant, suing by next friend) against the defendant, for negligently allowing an area or cellar in his possession, under a highway, to be open, whereby the plaintiff fell in and was injured.

Plea, not guilty. Joinder of issue.

At the trial before Pollock, B., at the Middlesex sittings after Trinity Term, 1874, the learned judge expressed his opinion that there was no evidence of negligence for the jury, and (the defendant having refused to consent to leave being reserved to the plaintiff to move to enter the verdict in his favor), he nonsuited the plaintiff, but stayed execution till the fifth day of Michaelmas Term, to enable the plaintiff to move to set aside the nonsuit, or for a new trial.

In the Long Vacation the plaintiff died. In Michaelmas Term, application was made for a rule for the defendant to show cause why the nonsuit should not be set aside or a new trial had. The court refused to grant any rule; but said that if it should become necessary to move to set aside the nonsuit from the defendant proceeding to tax his costs as against the plaintiff's next friend, they would hear the motion, as if it were made on the first occasion. *At the [55 end of term, the defendant gave notice of taxation of his costs of the nonsuit. The master declined to tax without a judge's order, and such an order was refused by Pollock, B.

1875

Hemming v. Batchelor.

The defendant then obtained a rule for the plaintiff to show cause why the master should not tax the defendant's costs, or why the court should not allow judgment for the defendant to be signed *nunc pro tunc*, and the plaintiff obtained a rule *nisi* to set aside the nonsuit, on the ground that there was evidence of negligence for the jury. The two rules were argued together.

McIntyre, Q.C., and *Reid*, now showed cause against the plaintiff's rule, and argued, first, that there was not sufficient evidence of negligence on the part of the defendant. [It is unnecessary to refer to this part of the argument.] Secondly, assuming that there was sufficient evidence, the action, being for an injury affecting the plaintiff personally, abated by his death, and the right given by the Common Law Procedure Act, 1852, to the representative of a deceased plaintiff to enter a suggestion and continue the action, only applies to cases where the action would, before the statute, have survived: *Flinn v. Perkins* (*). It is true that this is not a motion to enter a suggestion, as in that case, but it is a motion for a new trial with the object of continuing the action; and the same reasoning applies. Even if such a motion could be made, the next friend is not the personal representative of the infant. It is true that in *Freeman v. Rosher*(*), where there was a verdict for the plaintiff with leave for the defendant to move to enter a verdict, and the defendant died after the trial and before the next term, a motion to enter the verdict was allowed to be made, without putting the executors of the defendant on the record or making them parties to the rule, but that must have been on the ground that the leave reserved was equivalent to a consent that the action should survive. Again, the plaintiff was here nonsuited at the trial, and judgment would have been signed by the defendant, but for the stay of execution. The delay was, therefore, the act of the court, and judgment ought to be entered for the defendant *nunc pro tunc*, according to rule 56 of Hilary Term, 1853.

Cole, Q.C., and *Cowie*, in support of this rule.

56] * [THE COURT intimated that they would hear the argument on both rules before giving judgment.]

Sect. 139 of the Common Law Procedure Act, 1852, which enacts that the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict, is in the words of 17 Car. 2, c. 8, s. 1, and it was held that that section did not apply to cases of nonsuit:

(*) 32 L. J. (Q.B.), 10.

(*) 13 Q. B., 780; 18 L. J. (Q.B.), 340.

Dowbiggin v. Harrison ⁽¹⁾. The defendant will, no doubt, rely on the case of *Moor v. Roberts* ⁽²⁾, where the plaintiff having died in the interval between the trial (where a verdict had been directed in his favor, with leave for the defendants to move) and a rule being made absolute for a nonsuit, the court ordered judgment to be entered *nunc pro tunc*.

[POLLOCK, B.: Does that case decide more than that the court thought that they had a power to enter judgment *nunc pro tunc* under the particular circumstances?]

The court has a discretion, and it is submitted that this is a case in which it will not interfere.

[They were then stopped.]

McIntyre, Q.C., and *Reid*, in support of their rule: The defendant is entitled to have judgment entered *nunc pro tunc*. It is clear that the nonsuit must stand, and this being so, the stay of execution, the act of the court, was all that prevented the defendant from signing judgment in fourteen days. Where the defendant died pending the argument on a point reserved, on which judgment of nonsuit was afterwards given, the court ordered the judgment to be entered up of the term next after the trial, in order that his representatives might have the costs of the nonsuit: *Toulmin v. Anderson* ⁽³⁾.

[KELLY, C.B.: We are prepared to hold at once, that we have no power to grant a new trial. Is there any act which compels us to allow the defendant to enter judgment *nunc pro tunc*?]

The case of *Moor v. Roberts* ⁽²⁾ is in favor of the defendant's rule being made absolute.

*KELLY, C.B.: In this case we are called upon to exercise our discretion in a matter of considerable importance. The plaintiff, an infant, brought an action against the defendant, and this action was one of the class to which the rule "*actio personalis moritur cum persona*" applies. The action proceeded to trial, and at the close of the plaintiff's case the learned judge directed a nonsuit, and was desirous of putting the case in such a shape as might be most convenient for an appeal. This desire was counteracted by the defendant's refusal to leave being reserved to the plaintiff to move to enter the verdict in his favor; but at the same time we must assume that the learned judge had some doubt as to whether the nonsuit was in accordance with the law, for he stayed execution till the fifth day of Michaelmas Term, to enable the plaintiff to move for a new

⁽¹⁾ 10 B. & C., 480.

⁽²⁾ 1 Taunt., 384.

⁽³⁾ 3 C. B. (N.S.), 844; 27 L. J. (C.P.), 161.

trial. In the interval the plaintiff died. At the beginning of term an application was made for a rule *nisi* to set aside the nonsuit, and a rule *nisi* would no doubt have been granted but for the plaintiff's death: but owing to this obstacle the court merely gave the plaintiff's next friend permission to move, in case it should be necessary. The defendant afterwards applied to Pollock, B., in Chambers, for an order to tax his costs; but the learned Baron refused to make any such order. The defendant then waited till the last day of term, when the time for moving to set aside the nonsuit had elapsed, and then moved to rescind the order of Pollock, B., and for power to sign judgment *nunc pro tunc*.

Now, with regard to this application, it is clear that to ask us to enter judgment *nunc pro tunc* is to ask us to enter it as of a date when the learned judge who tried the case expressly refused to allow it to be entered. The question therefore is, are there any precedents for entering judgment *nunc pro tunc* where the judge who tried the case was himself of opinion that the judgment ought not to be entered. Now there is neither act of Parliament, regulation, nor settled practice which compels the court to make such an order under circumstances like the present. There are cases, no doubt, where a decision upon the merits has been obtained, and where, owing to the death of one of the parties, effect cannot be given to this decision without the intervention of the court. But the principle of those cases cannot apply where the learned judge has expressly withheld from the 58] defendant the power to sign *judgment; for if it were otherwise, we should overrule what is equivalent to an opinion that no judgment ought to be signed until the decision of the full court had been obtained. [After referring to the evidence of negligence, the Lord Chief Baron said:] It is unnecessary to express any opinion as to the defendant's liability; but having regard to our decision on the defendant's application, I think the plaintiff's rule may be allowed to drop.

POLLOCK, B.: I am of the same opinion. By rule 56 of Hilary Term, 1853, "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*." I refer to this rule for the purpose of drawing attention to the word "competent." This word is explained by what was the practice before any such rule of court existed. It was then the practice of the

courts, if either party died pending the time taken for argument on a motion in arrest of judgment or for a new trial, to enter judgment as of the term in which judgment would otherwise have been given. This judgment *nunc pro tunc* was a fiction of which the courts availed themselves for the purpose of aiding the party whom they thought entitled to judgment. Now here, after the plaintiff's case was closed, I, at the request of the defendant, directed a nonsuit; but I should certainly require more time for consideration before I decided whether the nonsuit should stand. The rule of court as to the entry of judgment does not, therefore, apply to the present case. With regard to the plaintiff's rule, it is perfectly clear that there cannot be a new trial, and that there is no authority for our granting it.

I think that, under these circumstances, that rule may be allowed to drop.

AMPHLETT, B.: I am of the same opinion. As soon as the position of the case was explained to me, I felt that it was impossible but that some way existed of avoiding so great an injustice as compelling the plaintiff's next friend to pay the costs of this action. The learned judge at the trial stayed execution because he thought the liability of the defendant a subject fit for discussion, and this *discussion cannot [59 now take place because of the death of the person injured. Under these circumstances I think the defendant cannot ask us, where the matter is in our discretion, to assist him. I do not think it necessary to add anything upon the subject of the plaintiff's rule, which cannot possibly be made absolute, and which I think may well be allowed to drop.

Plaintiff's rule allowed to drop; defendant's rule discharged without costs.

Attorneys for plaintiff: *Dangerfield & Blythe.*

Attorneys for defendant: *Nash, Field & Co.*

See Moak's Van Santvoord's Pl., Albany Law Jour., 410, Court of Appeals, 100-1; *Hayes v. Thomas*, 56 N. Y., 521; *Cox v. N. Y. Cent. R. R.*, 12;

[Law Reports, 10 Exchequer, 59.]

Feb. 8, 1875.

[IN THE EXCHEQUER CHAMBER.]

HOLKER V. PORRITT (*).

Easement—Water—Natural and Artificial Stream—Riparian Owner.

A natural stream was divided immemorially, but by artificial means, into two branches; one branch ran down to the river Irwell; the other passed into a farm yard, where it supplied a watering trough, and the overflow from the trough was formerly diffused over the surface, and discharged itself by percolation. In 1847, W., the owner of the land on which the watering trough stood, and thence down to the Irwell, connected the watering trough with reservoirs which he constructed adjacent to, and for the use of, a mill on the Irwell. In 1865, W. became owner of all the rest of the land through which this branch flowed. In 1867 he conveyed the mill, with all water rights, to the plaintiff.

In an action brought by the plaintiff against a riparian owner on the stream above the point of division, for obstructing the flow of the water:

Held (affirming the judgment of the court below), that the plaintiff was entitled to maintain the action.

APPEAL from the judgment of the Court of Exchequer discharging a rule obtained by the defendant to enter the verdict for him (*).

The facts of the case were as follows: From time immemorial two streams flowing down to a deep open valley called Buckden Ginnell, there joined, and the united stream was carried along an artificial embankment across Buckden Ginnell into the Broadwood Edge estate, and flowed to a point 60] in Broadwood Edge Farm, *marked E. on the plan used at the trial. There it was divided by a stone or feather, which had existed as far back as any of the witnesses remembered, and as to the origin of which there was no evidence. Part of the divided stream flowed down into Buckden Brook, and thence into the River Irwell; the other part flowed to a watering trough in Silas Wilson's farm, which formed part of the Lumn Hall estate. The water which flowed to the watering trough was formerly used for cattle and for domestic purposes, and the residue overflowed the trough, became diffused over the surface, and discharged itself by percolation through the soil.

In 1845 a Mr. Walker became owner of the Lumn Hall estate, which extended from Broadwood Edge to the River Irwell, and which was copyhold of the manor of Tottington, in the Salford division of the county of Lancaster. The

(*) Affirming 4 Eng. Rep., 480.

(*) Reported Law Rep., 8 Ex., 107; 4 Eng. Rep., 480.

estate comprised a cotton mill, situated on the banks of the Irwell, about half a mile distant from Silas Wilson's farm; this mill Walker proceeded to alter into a paper mill, and for the purpose of supplying it with water he constructed lodges or reservoirs adjacent to the mill, which, in 1846 and 1847, he connected with the watering trough on Silas Wilson's farm.

In 1865 Walker purchased the Broadwood Edge estate, which was also copyhold of Tottington Manor.

In 1867 he conveyed to the plaintiff the paper mill, with the lodges and reservoirs, and with power to enter on the Lumn Hall and Broadwood Edge estates to repair and construct weirs and goits, and also the full and free use and enjoyment of all springs, wells, and streams of water in, under, upon, or arising or issuing in or from any part of the Lumn Hall and Broadwood Edge estates. The land so conveyed was, at the nearest point, 400 yards distant from Silas Wilson's farm.

The defendants were owners of land traversed by the two streams which united in Buckden Ginnell, and the action was brought to recover damages for an obstruction by them of these two streams.

At the trial of the cause before Willes, J., at the Manchester Summer Assizes, 1872, an obstruction was admitted, and a verdict was entered for the plaintiff by consent, with 40s. damages, with leave to the defendants to move to enter a nonsuit or a *verdict for them, if the plaintiff was not [61 entitled to maintain this action.

A rule having been obtained and afterwards discharged ('), the defendants appealed.

Nov. 29, 30, 1874. *Herschell*, Q.C. (*Pope*, Q.C., and *Baylis* with him), argued for the defendants.

Holker, S.G. (*Kemplay*, Q.C., and *Gorst*, with him), for the plaintiff.

The following authorities were referred to: *Laing v. Whaley* ('); *Stockport Waterworks Company v. Potter* ('); *Hodgkinson v. Ennor* ('); *Sampson v. Hoddinott* ('); *Nuttall v. Bracewell* ('); *Miner v. Gilmour* ('); *Mason v. Hill* ('); *Dickinson v. Grand Junction Canal* ('); *Acton v. Blundell* ('); *Dudden v. Clutton Union* ("); *Chasemore v.*

(1) Law Rep., 8 Ex., 107.

(2) 3 H. & N., 675; 5 H. N., 480; 26 L. J. (Ex.), 327; 27 L. J. (Ex.), 422.

(3) 3 H. & C., 300.

(4) 4 B. & S., 229; 32 L. J. (Q.B.), 281.

(5) 1 C. B. (N.S.), 590; 26 L. J. (C.P.), 148.

(6) Law Rep., 2 Ex., 1.

(7) 12 Moo. P. C., 131.

(8) 3 B. & Ad., 304; 5 B. & Ad., 1.

(9) 7 Ex., 282; 21 L. J. (Ex.), 241.

(10) 12 M. & W., 324.

(11) 1 H. & N., 627; 26 L. J. (Ex.), 146.

1875

Holker v. Porritt.

Richards (¹); *Webb v. Bird* (²); *Wood v. Waud* (³); *Gale on Easements*, 3d ed., pp. 5, 102, 244, &c.; *Angell on Water-courses*, pp. 157, 158.

Cur. adv. vult.

Feb. 8, 1875. The judgment of the court (Lord Coleridge, C.J., Keating, Lush, Quain, and Archibald, JJ.), was delivered by

LUSH, J.: Upon the hearing of this appeal before us at the sittings after the last term, two questions were principally argued, first, whether the conveyance of the surplus water by means of the drain from the watering trough to the mill is to be considered as a prolongation of the stream entitling the mill-owner to the ordinary riparian rights thereon; and, secondly, if not, whether by the enjoyment without interruption for more than twenty years, first by Walker and [62] afterwards by the plaintiff, the latter had *acquired a right to the water as an easement by virtue of the Prescription Act.

Upon consideration of the peculiar facts of this case, we think that the plaintiff's title rests on a broader ground, and that he need not resort either to the theory of an extension of the stream or to the Prescription Act. It must be taken, upon the facts stated, that the owner of Silas Wilson's farm had a prescriptive right to the maintenance of the stone or feather at the point E., and of the diversion by means of it of part of the stream to and for the exclusive use of the farm. The water which came down to him at the farm was his own to use it as he pleased. There was no one entitled to share with him in its use, and no one who could call him to account for any use which he chose to make of it there. In this respect his position was different from that of a riparian owner, who only shares the use of the water in common with other riparian owners. In collecting the overflow at the trough and conveying it to the mill, he clearly did nothing in derogation of the rights of any other person, or which he was not entitled to do in the lawful use and enjoyment of his own property. Nor did he thereby lose any right which he then before had. While the water overflowed the trough and ran to waste, he had a right to complain of any undue diversion or obstruction of the stream which diminished the accustomed supply to the trough, and he acquired no greater right by conveying it to the mill. No doubt the consequences to a wrongdoer became more serious

(¹) 7 H. L. C., 349.

(²) 3 Ex., 748; 18 L. J. (Ex.), 305.

(³) 10 C. B. (N.S.), 268; 13 C. B. (N.S.), 841; 30 L. J. (C.P.), 384; 31 L. J. (C.P.), 335.

after the drain was made than they were before, because the wrongful act was more injurious, and larger damages would have to be paid for it; but it is a fallacy to say that a man's rights are abridged if, when he abuses them, he has to make larger compensation. It is the necessary effect of every appropriation of running water to a new and more beneficial use that a wrongful diversion or abstraction entails a larger measure of liability. It is established by many authorities, which are collected in and confirmed by *Mason v. Hill* (*), that as soon as the owner of land on a stream has appropriated the water to a beneficial use he may sue for the injury done to him in respect of such new use. In that case the proprietor having appropriated the stream to the use of a mill *newly erected, was held entitled to recover from [63 a proprietor higher up the stream damages for the injury to his mill occasioned by the wrongful diversion of the stream, although before the mill was built the wrongdoer would only have been liable to nominal damages.

If, therefore, Walker had been in possession of the mill in question, it is clear to us that he could have brought this action, not because he happened to be at the same time riparian owner higher up than the mill and also owner of the mill, but simply as owner of the mill. And there is no conceivable reason why the plaintiff should not have the same right, inasmuch as he is surrenderee of the mill with all the water rights annexed, and which had become appurtenant to it. Walker had chosen to create a servitude on his own land, but none has been created, or been attempted to be created, on the lands or riparian rights of the defendants.

None of the authorities cited conflict in the least degree with this view. In the case of *Stockport Waterworks Co. v. Potter* (†) the water was taken directly from the stream, in the regular flow of which the proprietors below had an interest; and it is clear that such use of the water could only grow into a right by twenty years' enjoyment. Whether that case was rightly decided or not; whether the grounds upon which the majority decided can be maintained, or whether it is distinguishable from *Nuttall v. Bracewell* (‡) we need not now consider. The present case stands clear both of the difficulty and the reasoning in that case, and we have no hesitation in holding, for the reasons we have given, that the judgment of the court below ought to be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Milne, Riddle & Mellor.*

Attorneys for defendants: *Woodcock & Ryland.*

(*) 5 B. & Ad., 1.

(†) 3 H. & C., 300.

(‡) Law Rep., 2 Ex., 1.

[Law Reports, 10 Exchequer, 64.]

Feb. 12, 1875.

[IN THE EXCHEQUER CHAMBER.]

64] *LARCHIN V. THE NORTH WESTERN DEPOSIT BANK.*Bill of Sale—Sufficiency of Description of Grantor—"Accountant."*

The grantor of a bill of sale was described in the affidavit filed under the Bills of Sale Act, as an "accountant." He was in fact a clerk in the accountant's department at the Euston Square Station of the London and North Western Railway Company, but in his leisure time was occasionally employed to balance tradesmen's books :

Held (affirming the decision of the court below) an insufficient description.

APPEAL from the judgment of the court below, discharging a rule obtained by the plaintiff in an interpleader issue to enter the verdict for him.

At the trial of the issue before Bramwell, B., at the Surrey Summer Assizes, 1872, it appeared that the bill of sale under which the plaintiff claimed was granted by one Samuel Whitehead, who was a clerk in the accountant's department at the Euston Square Station of the London and North Western Railway Company, but also, in his leisure time after office hours, was sometimes employed by tradesmen at Acton, where he resided, to balance their books. In the affidavit filed with the bill of sale under the Bills of Sale Act (17 & 18 Vict. c. 36), s. 1, he was described as an "accountant." The learned judge held the description to be insufficient, and a verdict was entered for the defendants, with leave to the plaintiff to move for a rule to enter the verdict for him, which rule was afterwards obtained, and on argument discharged ('). The plaintiff appealed.

Talfourd Salter, Q.C., argued for the plaintiff, and cited *Hewer v. Cox* ('); *Briggs v. Boss* ('); *Allen v. Thompson* ('). *Prentice*, Q.C., for the defendants, was not called on.

BLACKBURN, J.: The object of the act is to give notice to all who are likely to deal with the grantor of the bill of sale; 65] not to *enable a person who is curious on the matter to trace him out, but to enable one who is asked to give him credit to know at once, by looking at the register, whether the person he is asked to give credit to has executed a bill of sale. The description given here would not convey such information, and to allow it to be good would be in effect to strike out of the act the words which require a description

(') Law Rep., 8 Ex., 80.

(*) Law Rep., 3 Q. B., 268.

(*) 3 E. & E., 428; 30 L. J. (Q. B.), 73.

(*) 1 H. & N., 15; 25 L. J. (Ex.), 249.

of the grantor's "occupation." In *Briggs v. Boss* ⁽¹⁾ we went quite as far as we ought to go.

MELLOR, J.: I am of the same opinion. In *Briggs v. Boss* ⁽¹⁾ I thought we went to the very extreme limit, and had considerable hesitation in concurring in that decision, and I certainly will not extend it.

LUSH, GROVE, DENMAN and ARCHIBALD, JJ., concurred.
Judgment affirmed.

Attorney for plaintiff: *W. Norris.*

Attorneys for defendants: *Howard & Co.*

⁽¹⁾ Law Rep., 3 Q. B., 268.

[Law Reports, 10 Exchequer, 76.]

Jan. 28, 1875.

*GOODWIN V. ROBERTS and Others. [76]

Negotiable Instrument—Foreign Scrip issued by Agent in England.

Scrip issued in England by the agent of a foreign government, by which the holder is to be entitled, on payment of the instalments, to delivery by the agent of definitive bonds of the foreign government on their arrival in this country, is negotiable, and passes by delivery to a *bona fide* holder for value without title.

SPECIAL CASE stated in an action brought to recover the value of Russian and Hungarian Austro-scrip sold by the defendants under the following circumstances:

In 1873 the Russian government, being about to raise a loan on bonds, employed Messrs. Rothschild, bankers, carrying on business in the city of London, as their agents for that purpose in this country.

In pursuance of this employment Messrs. Rothschild, in December, 1873, issued in London scrip for the loan in the following (printed) form:

"1873.

C.

1873.

"Imperial Government of Russia. Issue of £15,000,000 sterling nominal capital in 5 per cent. Consolidated Bonds of 1873; negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. De Rothschild Brothers, Paris. Bearing interest half-yearly, payable in London from 1st December, 1873.

*"Scrip for one hundred pounds stock, No.

[77

Received the sum of twenty pounds, being the first instalment of twenty per cent. upon one hundred pounds stock; and on payment of the remaining instalments at the periods specified, the bearer will be entitled to receive a definitive

1875

Goodwin v. Roberts.

bond or bonds for one hundred pounds after receipt thereof from the Imperial Government.

"London, 1st December, 1873.

"The instalments are to be paid at our office as follows :

"£15 per cent. or £15, on the 5th February, 1874.

"£15 " £15 " 9th March "

"£20 " £20 " 2d May "

"£23 " £23 " 9th June "

"Subscribers may pay the same under a discount of 3 per cent. per annum on any Monday or Thursday after the 16th instant.

"In default of payment of these instalments at the proper dates all previous payments will be liable to forfeiture."

[Here followed receipts (unsigned) for the four other instalments.]

"Imperial Russian Five per Cent. Loan, 1873. £2 10s.

"No.

"On the 1st June, 1874, this warrant for two pounds ten shillings, being six months' interest on £100, will be paid at the office of Messrs. N. M. Rothschild & Sons, London."

On the payment of the several instalments the printed receipts were signed by Messrs. Rothschild.

The bonds were made and delivered in Russia to Messrs. Rothschild, who, in June, 1874, issued them in London to the holders of the scrip. They were in the following form :

"Imperial Government of Russia,

"£15,000,000, sterling,

"In five per cent. consolidated Russian railway bonds.

"Fourth emission.

"Created and issued in conformity with the Imperial ukase of the 14/26 November, 1873, for the railways, Odessa, &c., redeemable by annual drawings in 81 years, on the 19th November (1st December) in each year.

"C.

No.

£100 sterling.

"The bearer of this bond is entitled to £100 sterling, with 78] *interest at 5 per cent., until the time of the redemption fixed by the drawing, which interest will be paid half-yearly, on the 20th of May (1st June) and 19th of November (1st December) each year, on presentation of the coupons hereunto attached at either of the following places.

"At the office of Messrs. N. M. Rothschild & Sons, in London, in pounds sterling. At that of Messrs. De Rothschild Brothers, Paris, at the exchange of the day at London [and similarly at St. Petersburg, Frankfort-on-the-Main, Amsterdam and Berlin].

"The bonds are redeemable at par in 81 years by means of annual drawings at St. Petersburg, commencing on the 19th November (1st December) conformably with the subjoined table of redemption.

"The payment of the drawn bonds will take place six months later, at the same places, and at the same exchange as the coupons.

"Coupons due after the date of the drawn bonds must remain attached thereto, otherwise the amount of missing or unduly received coupons will be deducted from the capital on payment of the bond.

"This bond has forty-two coupons attached for 21 years, and a talon for renewal of the coupons at the expiration of that time. If the bond has not been drawn for redemption, new coupons will be delivered to the bearer without expense on application at London, or Paris, or St. Petersburg, against presentation of the talon."

[Here followed an enumeration of the bonds to be issued.]

"Agents.—N. M. Rothschilds."

[Here followed a copy of the ukase of the 14/26 November, 1873, signed by the Emperor of Russia, under which the bonds were issued.]

The Austro-Hungarian scrip was similar in form to the Russian so far as concerned the question between the parties, and was similarly issued by Messrs. Rothschild in London.

In February, 1874, the plaintiff purchased £200 of the Russian scrip, on which the instalments were fully paid up in advance, and also £300 of the Austro-Hungarian scrip.

On the 27th of February, the broker through whom the plaintiff purchased the scrip, and in whose hands it [79] had been left to be dealt with as the plaintiff might direct, pledged it with the defendants as security for a loan of £800 then made to him by them. In April he was declared a defaulter on the Stock Exchange, and subsequently absconded and was made bankrupt, and default having been made in repayment of the loan of £800, the defendants, who were ignorant of the plaintiff's claim, sold the scrip for a sum of £471 5s.

The case contained the following finding as to usage :

"The scrip of loans to foreign governments, entitling the bearers thereof to bonds for the same amounts when issued by the government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and foreign stock exchanges, and through them by

1875

Goodwin v. Roberts.

the public, for above fifty years. It is and has been the usage of such bankers, money dealers, and stock exchanges, during all that time, to buy and sell such scrip, and to advance loans of money upon the security of it, before the bonds were issued, and to pass the scrip upon such dealings by mere delivery as a negotiable instrument transferable by delivery; and this usage has always been recognized by the foreign governments and their agents delivering the bonds when issued to the bearers of the scrip. This usage extended alike to scrip issued abroad by foreign governments and scrip issued by their agents in England, and it extended to the scrip now in question, which was largely dealt in as above mentioned. Such scrip often passes through the hands of several buyers and dealers in succession before the issue of the bonds represented by it."

The question for the opinion of the court, was whether the defendants were, as against the plaintiff, entitled to the said scrip and the proceeds thereof.

Jan. 27. *Benjamin*, Q.C. (*Anstie* with him), for the plaintiff: The scrip held by the plaintiff was not negotiable paper in a legal sense, that is, so that the property in it would pass to a *bona fide* holder for value by delivery without title. It is neither a bill of exchange nor a promissory note, but merely an obligation on Messrs. Rothschild to deliver to the subscriber, on payment of the instalments by 80] him, bonds of the Russian government to a like *amount, provided the Russian government shall have delivered those bonds to them. The instrument is issued in England by bankers residing here; it does not come into England as a document existing abroad and bearing in the place of its issue the character of negotiable paper; and the question, therefore, is, whether it is in the power of bankers and financiers here to create a new species of negotiable paper without the authority of Parliament. In *Dixon v. Bovill* (¹), in the case of iron warrants, it was decided, on general principles equally applicable to this case, that it was not possible by the custom of the market to create new classes of negotiable instruments.

[BRAMWELL, B.: Does this scrip contain any promise or engagement by Messrs. Rothschild?]

It contains no statement or promise except by them. The Russian government is no doubt engaged to Messrs. Rothschild, but it is not engaged to the public; it is only hereafter to become engaged to them by the issue of the definitive

(¹) 3 Macq., 1.

bonds. Messrs. Rothschild are to be the agents of the Russian government in distributing the bonds when they arrive ; in the meantime they themselves issue the scrip and sign the receipt, not signing as agents, and by the terms of it engage that if the Russian government provides them with the corresponding bonds, they will issue them to the lawful holders of the scrip. This distinguishes the case from *Gorgier v. Mieville* (¹), which was the case of a definitive bond, signed by the King of Prussia and issued in Prussia, and which came to England with the character of a negotiable instrument. The scrip here is no more equivalent to such a bond than an undertaking to give a bill of exchange is equivalent to a bill of exchange. It stands on no higher footing than other paper issued in England, and treated in the market as negotiable, though not such by law, and is entirely within the decision of the Court of Queen's Bench in *Crouch v. Crédit Foncier* (²).

Brown, Q.C. (*Robarts* with him), for the defendants: *Crouch v. Grédit Foncier* (³) is no authority in the present case, for this is not an English instrument, but is an instrument issued by a foreign sovereign through his agent in England, and negotiable all over *Europe. It is not, in [81 fact, distinguishable from the foreign bonds which were treated as negotiable in *Gorgier v. Mieville* (¹) and *Attorney-General v. Bouvens* (⁴). The scrip shows, on the face of it, that Messrs. Rothschild assume no personal responsibility, but act only as the agents of the Russian government. It is in that capacity that they sign the receipts for the instalments and there are no words of contract in the instrument. Agents acting for a foreign government are not personally liable: *Story on Agency*, §§ 302, 303, 304; the contract is with the foreign government only. The whole transaction, the scrip not less than the bonds to which the scrip is only preliminary, is founded on the ukase of the Emperor of Russia, and the instrument is not an English, but a Russian instrument. The scrip cannot, therefore, properly be described as a chose in action, which signifies a contract which can be enforced by action or suit: *Williams on Executors and Administrators*, 7th ed., vol. i., p. 784; for there is no person against whom it could be enforced, either at law or in equity: *Duke of Brunswick v. King of Hanover* (⁵); *De Haber v. Queen of Portugal* (⁶). It is, in substance and fact, the instrument of a foreign government, and as such

(¹) 3 B. & C., 45.

(²) 2 H. L. C., 1.

(³) *Law Rep.*, 8 Q. B., 374.

(⁴) 17 Q. B., 171; 20 L. J. (Q.B.), 488.

(⁵) 4 M. & W., 171.

1875

Goodwin v. Roberts.

forms, by general mercantile usage, a part of the currency of Europe: *Lang v. Smyth* ('); *Wookey v. Pole* ('); *Miller v. Race* ('); *Mercer County v. Hacket* (').

[BRAMWELL, B.: That case seems directly contrary to *Dixon v. Bovill* (').]

Benjamin, Q.C., in reply: This is a contract made in London, and to be executed in London, and is, therefore, an English contract. The cases referred to were all cases of promises to pay money; this is only an undertaking to deliver a bond, when it is provided. Whatever might be the case, if the scrip were really issued abroad, it can no more be in the power of a foreign government (even assuming this to be the act of a foreign government) than of a private person to issue in England, as negotiable paper, paper which is not by the law of the country negotiable.

Cur. adv. vult.

82] *Jan. 28. BRAMWELL, B.: This case, which was argued before us yesterday, was said, and said truly, to raise a very important question. Scrip of this nature is dealt with to the extent of millions, and no doubt the question is of importance, not only as between buyers and sellers, but also to those foreign governments who wish to raise money, and to those who raise it for them in this country. But I think it is quite clear what our decision should be. The case of *Gorgier v. Mieville* (') is in force, and not overruled; and it was there decided, in the case of a Prussian bond, that a *bona fide* holder for value was entitled to it as against a rightful owner from whom it had been stolen, or who had been wrongfully deprived of it. It was therefore admitted in this case, and could not be denied, that if this had been a bond, the defendant would have been entitled to our judgment; but it was said that, this being scrip, it would be otherwise. In the judgment of Abbott, C.J., in *Gorgier v. Mieville* ('), he states it as the reason of his decision that, by the course and practice of the market, of the people who buy and sell and deal in, and are interested in and are liable upon, the bonds in question, the property in them passes by delivery to a *bona fide* holder for value. As far as one can see, that is a reason of general application. But no doubt Mr. Benjamin has a right to argue that, although the court put no qualification on that general reason, yet they must be taken to be applying it to the case they were dealing with—that is, the case of a bond; and that the subsequent

(1) 7 Bing., 284.

(2) 4 B. & Ald., 1.

(3) 1 Sm. L. C. (8th ed.), p. 468.

(4) 1 Wallace R., 83, at p. 95.

(5) 3 Macq., 1.

(6) 3 B. & C., 45.

case of *Crouch v. Crédit Foncier* ⁽¹⁾ shows that an engagement to pay money to bearer, not entered into by a promissory note or a bill of exchange, is not transferable from hand to hand so as to give a title to the person who receives it, although he takes it for valuable consideration, as against one who had been deprived of it, and that the law does not allow the effectual creation of such instruments as negotiable instruments; that such an instrument is no more in the situation of a bond than an engagement or undertaking to give a promissory note is in the situation of a promissory note; and that, as an undertaking to give a promissory note could not be made transferable from hand to hand, either by practice or custom, neither can an instrument of this nature be made so transferable.

*But that argument is made on the assumption that [83 Messrs. Rothschild are here the contracting parties. Now, I am clearly of opinion that they are not, and that they enter into no contract. They are the mere agents for the negotiation of the loan, or so much of it as is negotiated in London; another firm of Messrs. Rothschild being agents for the negotiation of the loan in Paris. In my opinion, they do not undertake that the bonds shall be delivered. They do not undertake even that if the bonds come to England they shall be delivered. They do not undertake the payment of interest. They do not undertake any obligation of any sort or kind. They simply receive the money for the Russian government from the parties who subscribe the loan, and who hold these documents, having no rights against the Messrs. Rothschild, but having rights, such as they are, against the Russian government only.

Being of that opinion, I am of opinion that this scrip is as much a Russian instrument as the bond itself would be. And I confess it appears to me shocking to one's common sense to hold that this thing, whatever it is called, which will result in a bond, which is a sort of *interim* bond, which is something preparatory to a bond being given, which is of a temporary character and is to terminate in a bond, is itself in a plight different as to negotiability from that which the bond would be in. It would be drawing a distinction which would be utterly unintelligible to the commercial world at large. I can see no ground for such a distinction, and therefore, on the ground that *Gorgier v. Mieville* ⁽²⁾ shows that if this had been a Russian bond the defendants would have been in the right, and that to my mind this instrument is as much a Russian instrument as a Russian bond would be, I

⁽¹⁾ Law Rep., 8 Q. B., 374.

⁽²⁾ 3 B. & C., 45.

1875

Goodwin v. Roberts.

think that what would be true of the bond is true also of the scrip, and that the defendants are therefore entitled to our judgment.

If *Gorgier v. Mieville* (1) did not exist, the topics which have been urged upon us as to the locality of the contract, and the power of the Emperor of Russia to make an instrument negotiable here, might be very properly discussed; but as that case is an existing and binding authority, it [84] is conclusive upon these matters, *and the only question is whether you can distinguish between the bond and the scrip.

One other observation I will make. It is manifest on the finding of this case that when the scrip is taken to Messrs. Rothschild, or (I ought perhaps to say) to the Russian government, they undertake that they will give to the holder of the scrip a bond; and I understand, from the statement of the facts, that if the plaintiff were to go to them and say, "Do not give it to the defendants; give it to me, because I am the rightful owner of the scrip," they would refuse to do so. They would say, "No; we shall recognize the *bona fide* holder for value, whoever he may be." If that is so, it seems to me to be extremely difficult to say that the documents can be intercepted in anybody's hands in the meanwhile. I think our judgment must be for the defendants.

CLEASBY, B.: I am entirely of the same opinion. And I might leave the case on the grounds so clearly stated by my Brother Bramwell; but I should like to add a few words on what I consider to be the nature of these instruments. They emanate from the government of Russia, and to understand the matter I think we must go back to the ukase of the Emperor. It appears from that document that money is wanted for the construction of railways, and that for that purpose it is necessary to raise a loan of £15,000,000. It is stated that subscriptions will be opened, and this loan, when contracted, will be met by bonds. The loan is contracted on this footing, that the persons, whoever they may be, holding these documents shall, if the Russian government keeps faith with them, receive bonds on payment of their subscriptions by instalments at stated times, under which they will be entitled to receive payment at the times and according to the drawings specified in the bonds. The bond is then the document of title for a part of the loan. It is not money. The value of it depends on the manner in which the Russian government keeps faith with the subscribers. It is really the document of title by virtue of which persons

(1) 3 B. & C., 45.

can go to the Russian government and receive (if the Russian government keeps faith with the public) certain payments.

That being the nature of the bond, in what respect does this other document differ from it? Is it not the title by virtue of *which the person holding it, according to the [85 terms of it, can call upon the government of Russia to give him the title to the money, that is, to give him the bond? The bond is not the money, it is only the title to the money. This document is founded upon the same idea, that the Russian government will keep faith and give to the holders of these documents, according to its terms, the benefit which it holds out to them. It is, therefore, the document of title issued by the Russian government as binding upon them, and, as in the case of the bond, they make the bearer of it entitled to payment. The heading of the document is sufficient to indicate its nature. "Imperial Government of Russia. Issue of £15,000,000 sterling nominal capital in Five per Cent. Consolidated Bonds of 1873." It is true that Messrs. Rothschild have signed the document on their own behalf; but as soon as they have signed the first receipt, it is authenticated by them as the document of the Imperial government of Russia, and that is, in my opinion, the only effect of their signature. The bonds are authenticated by the signature of the Emperor himself. What is this scrip, then, but the act of the Russian government? So it becomes a document of title by which the bearer is entitled to the repayment of certain money advanced, and it has, in my opinion, precisely the same character as the other. But for the advantage which the public receive of making the loan by instalments, there is no necessity for the scrip at all; and the moment the first instalment is paid there is no obligation on any one to pay another, and there may be an end of the transaction. It is issued by the Russian government as a document of title, and by which the person holding it is not only to receive a bond, but is entitled to receive money just as much as he is entitled to receive it on the bond itself, for there is at the foot of the scrip the entry, "On the 1st of June, 1874, this warrant for £2 10s., being six months' interest on £100, will be paid at the office of Messrs. Rothschild & Sons, London." Therefore, when the matter is really looked at, it is impossible to make any sound distinction between the bond and the scrip; they both represent a title to receive money from the Russian government. We have, then, a clear guide in *Gorgier v. Mieville*(¹), and there

(¹) 3 B. & C., 45.

86] is nothing in the case of *Crouch v. *Crédit Foncier* ('), or in *Dixon v. Bovill* ('), to conflict with our decision.

Judgment for the defendants.

Attorney for plaintiff: *J. B. Batten.*

Attorney for defendants: *J. H. Mackenzie.*

(¹) Law Rep., 8 Q. B., 374.

(²) 3 Macq., 1.

The bonds of a railway company payable to bearer are negotiable securities: *White v. Vermont, etc.*, 21 How. U. S., 575.

So a note under seal: *Bank v. R. R. Co.*, 5 S. C., 156.

See 6 Eng. Rep., 120 note; 9 Eng. Rep., 115 note; 1 Southern Law Review, 189, article by Mr. J. W. Daniel.

Coupons attached to a railroad or other bond payable to bearer are negotiable instruments, and a purchaser thereof in good faith before due acquires a good title thereto: *Evertson v. Nat'l Bank*, N. Y. Court of Appeals, April 18, 1876, modifying 4 Hun, 692; *Hotchkiss v. Bank*, 21 Wall., 354; *Tilden v. Blair*, 21 Wallace, 241; *Clark v. Iowa City*, 20 Wallace, 583; *Chapman v. Rose*, 56 N. Y., 140; *Dinsmore v. Duncan*, 57 N. Y., 573.

Contra: Arents v. Com., 18 Grattan (Va.), 750.

Though if purchased from one not having valid title thereto after they are payable—the third day of grace—the purchaser acquires no title: *Evertson v. National Bank* (N. Y. Court of Appeals), *supra*; *Vermilyea v. Express Co.*, 21 Wallace, 138; see also *U. S. v. Vermilyea*, 10 Blatchford, 280.

Persons who purchased United States bonds payable to the state of Texas or bearer, alienated during rebellion by the insurgent government, and acquired after the date at which the bonds became redeemable, are affected with notice of defect of title in the seller: *Texas v. White*, 7 Wallace, 703.

A party buying bonds of the United States with overdue and unpaid coupons attached, is to be taken as affected with knowledge of prior equities when he purchased them after the date when they are redeemable and for which the coupons run, knowing that the government paying promptly all its bonds generally objects at that time to redeem these, and does not in fact redeem them or the overdue coupons, and where

notice has been given in public papers of great circulation that payment of the bonds was forbidden, and there was difficulty about them: *Texas v. Har-den-berg*, 10 Wallace, 68; see *Hotchkiss v. Bank*, 21 Wall., 354.

No one can become a *bona fide* holder of a promissory note, so as to shut out a valid defence by the maker, when such holder takes it after, by its terms, money is past due upon it. When a note is for the payment of money at a specified time, with interest payable annually, the payment of interest *annually* is as much a part of the agreement as the promise to pay the principal. It is a portion of the debt, and if when the note is sold to a third person, by the payee, a year's interest is past due the note is then dishonored. When the instrument furnishes evidence that the written promise to pay has been broken, a party taking the same takes it with a warning that the maker may have some defence: *Newell v. Gregg*, 51 Barbour, 263; *Bank v. County Com'rs*, 14 Minnesota, 77.

The fact that a promissory note, the principal of which is payable in four years with interest annually, bears no indorsement of the receipt of either of the three instalments of interest which have fallen due, does not of itself render the note subject in the hands of a third person who then took it as collateral security, to equities existing between the original parties to it; but is a circumstance for the consideration of the jury, on the issue whether he took it in good faith and without notice of such defence: *National, etc.*, v. *Kirby*, 108 Mass. R., 497; *Boss v. Hewitt*, 15 Wisc., 260.

It is clear that a purchase on the last day of grace is a purchase before due: *Evertson v. National Bank of Newport*, N. Y. Court of Appeals, April 18, 1876, modifying 4 Hun, 692; 6 Eng. R., 120; *Dailey v. Proetz*, 20 Minnesota, 411; *Cromby v. Grant*, 36 N. H., 273, 278.

The reader should observe that the head-note to the last case is the reverse of what the court held; the word "not" being accidentally omitted in the head-note.

The contrary was held in *Pine v. Smith*, 11 Gray, 88; but the case is disapproved by Mr. Parsons: 1 Parsons on Bills and Notes, 263 note.

In *Evertson v. National Bank of Newport*, the New York Court of Appeals held April 18, 1875 (modifying 4 Hun, 692), that coupons in the following form:

"\$35. The Indianapolis, Bloomington and Western Railway Company will pay the bearer, at its agency in the city of New York, thirty-five dollars in gold coin, on the first day of April, 1871, for semi-annual interest on bond No. —."

"A. P. LEWIS, Secretary."

were negotiable promissory notes, and if purchased on the last day of grace a *bona fide* purchaser from a thief acquired a valid title thereto. But that interest warrants in the following form:

"\$35. Interest warrant for \$35 thirty-five dollars upon bond No. —, of the Danville, Urbana, Bloomington and Pekin Railroad Company. Payable in gold coin at the office of the Farmers' Loan and Trust Company in the city of New York, April 1, 1871.

"W. J. ERMENROUT, Secretary."

were not negotiable. That a custom of business men to treat them as such would not change their legal character. That a purchaser, even before due, from one having no title would acquire none. That the owner by cutting them off and selling them could assign them, but his purchaser would take no better title than the purchaser of any non-negotiable instrument. It would seem to follow that payment by the maker to one who had not valid title thereto would be invalid, and the real owner could again recover thereon.

Though a broker once had notice of the stealing of negotiable bonds, yet if he afterwards in good faith purchase them, forgetting the fact, he is a *bona fide* holder. There must be actual bad faith: *Lord v. Wilkinson*, 56 Barbour, 593; *Dinsmore v. Duncan*, 57 N. Y., 573.

But see *Vermilyea v. Express Co.*, 21 Wallace, 138.

An indorsement to a third person which has been so neatly erased as not to be discoverable by ordinary observation, will not prevent a *bona fide* purchaser from acquiring a valid title: *Dinsmore v. Duncan*, 57 N. Y., 573; see also *U. S. v. Vermilyea*, 10 Blatchf., 280; *Hotchkiss v. Bank*, 21 Wall., 854.

Nor will a *lis pendens*: *Holbrook v. New Jersey, etc.*, 57 N. Y., 616.

Where the holder of a promissory note which is invalid in his hands, by reason of its having been already paid, wrongfully transfers it before maturity, to a *bona fide* holder who enforces payment thereof, an action will lie against such original holder, to recover back the amount: *Newell v. Gregg*, 51 Barbour, 268.

It has been held that a coupon was so far a portion of the debt secured by a bond that it was not barred by the statute of limitations, unless the lapse of time was sufficient to bar a suit upon the bond: *Lexington v. Butler*, 14 Wallace, 282; *Kenosha v. Lamson*, 9 Wallace, 477.

But where the statute barred actions upon all written contracts within ten years after the cause of action accrued, held, the statute commenced to run against actions for coupons with interest annexed to municipal bonds when they had been detached from the bonds and transferred to parties other than the holders of the bonds, from the maturity of the coupons respectively.

Clark v. Iowa City, 20 Wallace, 583. As we understand this case it is not in conflict with the former. It simply holds that the statute commences to run on the coupon when it is payable, and not at a future time when the principal of the bond was, by its terms, payable.

A coupon may be sued as a negotiable instrument independent of the bond, though the latter have been paid and extinguished: *National, etc., v. Hartford, etc.*, 8 Rhode Island, 375; *Clark v. Iowa City*, 20 Wallace, 583, 589; *City v. Lamson*, 9 Wallace, 477; *Town v. Culver*, 19 Wallace, 84; *New London, etc., v. Ware, etc.*, 41 Conn., 542.

The case of *Smith v. Clark Co.*, 1 Cent. Law Jour., 5, is reported 54 Missouri, 58.

A coupon in this form, "Interest warrant No. 12. On the first day of July, 1856, the X. Railroad Company will pay to bearer thirty dollars for

1875

Goodwin v. Robarta.

interest on its bond No. 342, J. S., Treasurer," is negotiable by delivery, and may be enforced against the corporation by any holder in good faith: *Haven v. Grand, etc.*, 109 Mass., 88.

As to indorsements upon such bonds, affecting their negotiability, see *Sanders v. Bacon*, 8 Johns., 485; *Tappan v. Ely*, 15 Wend., 362; *Benedict v. Gowden*, 49 N. Y., 396; *U. S. v. Vermilyea*, 10 Blatchford, 280; *Hotchkiss v. Bank*, 21 Wall., 354.

Coupons attached to a mortgage upon a railroad are a part of the mortgage debt though the holder thereof have no interest in the mortgage; the holder of the coupons is entitled to share *pro rata* in the proceeds of a sale under a foreclosure of the mortgage: *Sewell v. Brainard*, 38 Vermont, 364; *Müller v. R. & W. R. R.*, 40 Vermont, 899.

See *Haven v. Grand, etc.*, 109 Mass., 88; *Sturges v. Knapp*, 36 Vermont, 439.

Where a mortgage is given to secure two or more promissory notes or obligations falling due at different times, transferred to and held by different persons, some cases hold that the instrument first becoming due, irrespective of the order of transfer, is to be first paid from the proceeds of the mortgage, and so on in the order in which they become due.

Alabama: *Bloodgood v. McVay*, 9 Porter, 547; but see this case distinguished in *Cullum v. Erwin*, 4 Alabama, 452, in class 2.

Florida: *Wilson v. Hayward*, 6 Florida, 171.

Illinois: *Flower v. Ellwood*, 66 Illinois, 441; *Van Sant v. Allamon*, 23 Illinois, 30; *Sargeant v. How*, 21 Illinois, 148; *Funk v. McReynolds*, 33 Illinois, 481.

Indiana: *Bank v. Tweedy*, 8 Blackf., 447; *Stanley v. Beatty*, 4 Ind., 134; *Hough v. Osborn*, 7 Ind., 140; *Hunt v. Harding*, 11 Ind., 245; *Harrison v. Harlan*, 14 Ind., 439; *Murdock v. Ford*, 17 Ind., 52.

Iowa: *Grapengether v. Fejervary*, 9 Iowa, 163; *Rankin v. Major*, 9 Iowa, 297; *Hinds v. Moers*, 11 Iowa, 211.

Maine: *Larabee v. Lambert*, 32 Maine, 97, except that interest on all the notes is to be first paid.

Missouri: *Mitchell v. Laden*, 36 Missouri, 526.

New Hampshire: *Hunt v. Stiles*, 10 N. H., 466.

Ohio: *Bank v. Singer*, 13 Ohio Rep., 240.

South Carolina: *Muller v. Wadlington*, 5 S. C. Rep., 346.

Virginia: *Gwathmeyer v. Ragland*, 1 Randolph, 466. The first note was paid, the second first transferred and then the third. The court simply held the second note should be first paid out of the proceeds. This may be held to fall under the class holding they are to be paid in the order of transfer.

Wisconsin: *Wood v. Trask*, 7 Wisc., 566, unless some special equity intervene: *Marine Bank v. International Bank*, 9 Wisc., 48; *Lyman v. Smith*, 21 Wisc., 674.

Others that they are to be paid in the order of their transfer.

Alabama: *Cullum v. Erwin*, 4 Alabama, 452; *Bank v. Bank*, 9 Ala., 645. *Cullum v. Erwin*, 4 Ala., 452, holds explicitly that in the absence of anything showing a contrary intent the notes are to be paid in the order of transfer.

It distinguishes *Bloodgood v. McVay*, 9 Porter, 547, by showing that in the latter case the first note was transferred, so that that case does not conflict with *Cullum v. Erwin*.

Virginia: *Gwathmeyer v. Ragland*, 1 Randolph, 466; see the remarks upon this case under the class of cases holding the notes are to be paid in the order in which they become due.

Others that the obligations are to be paid *pro rata* unless the obligee at the time of the transfer intended to give one a preference over the others.

California: *Hartley v. Waterhouse*, 1 Labatt, 64; *Grattan v. Wiggins*, 23 Cal., 31.

Connecticut: *Lewis v. Deforest*, 20 Conn., 427.

Maine: *John v. Candage*, 31 Maine, 28; *Moore v. Ware*, 38 Maine, 496.

Michigan: *Cooper v. Ulman*, Walker's Chy., 251, and see *Hull v. Swartout*, 29 Mich., 249.

Mississippi: *Parker v. Mercer*, 7 Miss. (6 How.), 820; *Cage v. Iler*, 13 Miss. (5 Smedes & Marsh.), 410; *Terry v. Woods*, 14 Miss. (6 Smedes & Marsh.), 150; *Henderson v. Herrod*, 18 Miss. (10 Smedes & Marsh.), 631; *Bank v. Tarleton*, 23 Miss., 173; *Pugh v. Holt*, 27 Miss., 461; *Trustees v. Prentiss*, 29 Miss., 50.

Ohio: *Bushfield v. Meyer*, 10 Ohio, St. Rep., 334. In this case it was held the obligee reserved by the assignment sufficient of the assets to pay the note retained by him, so that the case is not inconsistent with *Bank v. Singer*, 13 Ohio, 240.

New York: *Righter v. Stall*, 3 Sandf. Chy., 608; *Rathbun v. Stocking*, 2 Barb., 135; *Bridenbecker v. Lowell*, 32 Barb., 10.

Pennsylvania: *Donley v. Hayes*, 17 Serg. & Rawle, 400; *Perry's Appeal*, 22 Penn. St. Rep., 43; *Hancock's Appeal*, 34 Penn. St. Rep., 155.

Rhode Island: *Waterman v. Hunt*, 2 R. I., 298.

Tennessee: *Ewing v. Arthur*, 1 Humphrey, 537.

Vermont: *Small v. Brainard*, 38 Vermont, 364; *Keyes v. Wood*, 21 Vermont, 331.

And in England the rule is the same as to payment of legacies, though payable at different times: *Clark v. Sever*, 3 Atkins, 100; *Miller v. Huddleston*, 3 McNaghten & Gorden, 513, and see cases cited in note by Mr. Perkins to Little, Brown & Co.'s ed.; *Blower v. Morret*, 2 Ves. Sen., 420; *Braithwaite v. Braithwaite*, 1 Vern. Chy., 334; *Carpenter v. Carpenter*, 1 Vern. Chy., 440; *Eure v. Eure*, 1 Eq. Cas. Abr., 115, case 15.

In the following cases it was held the facts showed an intention on the part of the obligee at the time of the transfer to give one a preference over the others.

California: *Grattan v. Wiggins*, 23 Cal., 16, 81; *Sherman v. Dunbar*, 6 Cal., 53. See *Hocker v. Reas*, 18 Cal., 650.

Illinois: *Walker v. Dement*, 42 Ills., 272, 276.

Kansas: *Noyes v. White*, 9 Kansas, 640.

Maine: *Moore v. Ware*, 38 Maine, 498.

Massachusetts: *Bryant v. Damon*, 6 Gray, 564, 567.

Mississippi: *Mississippi Bank v. Tarleton*, 23 Miss., 173; *Trustees v. Prentiss*, 29 Miss., 50.

New York: *Van Rensselaer v. Stafford*, Hopkins' Chy., 569, affirmed 9 Cowen, 316, as explained in *Cooper v. Utman*, Walker's (Mich.) Chy., 251; see also *Bush v. Lathrop*, 22 N. Y., 543; *Bank v. Bank*, 9 Wend., 410; *Pattison v. Hull*, 9 Cowen, 752.

12 ENG. REP.

Ohio: *Bushfield v. Meyer*, 10 Ohio, St. Rep., 334.

Tennessee: *Ewing v. Arthur*, 1 Humph., 537.

Vermont: *Wright v. Parker*, 2 Alken, 212; *Keyes v. Wood*, 21 Vermont, 331; *Langdon v. Keith*, 9 Vermont, 299.

Wisconsin: *Robinson v. Brockway*, 23 Wisc., 407.

Such intention may be sufficiently proved by the circumstances surrounding the transaction, although the mere fact of a transfer of one is not sufficient. So by an express agreement. See the cases before cited.

Also *Brownlee v. Arnold*, 60 Mo., 79.

In a suit to foreclose such a mortgage the holders of all the notes or obligations should be parties: *Wilson v. Hayward*, 2 Florida, 27; *Grattan v. Wiggins*, 23 Cal., 16.

Though in Illinois it is said that if the holder of the first note forecloses without making the holders of the other notes parties, the mortgage is extinguished, but the holders of the subsequent notes can redeem from him: *Van Sant v. Allamon*, 23 Illinois, 30, 35.

Such would possibly be the effect elsewhere as between the mortgagor and holders of the subsequent notes, if a foreclosure were allowed to proceed without a plea in abatement on account of the non-joinder of such other holders. Although it would seem to be contrary to principle to hold that one's rights could be cut off by a suit to which he was not a party: *Moore v. Ware*, 38 Maine, 496.

As to whether it can be foreclosed before the last note falls due, see *Brownlee v. Arnold*, 60 Missouri, 79.

A third person who supplies the money to pay the coupons of bonds secured by a mortgage will have the security of the mortgage though the coupons have been detached. But the equities of the bondholders, who delivered their coupons for payment and supposed they were paid, are superior to those of such person. The holders did not assign or transfer their coupons to him. They had a direct interest in having them paid, so as to preserve the value of the security: *Union, etc., v. Monticello, etc.*, 1 Weekly Dig., 400, 12 Albany Law Jour., 377, N. Y. Court of Appeals; *Haven v. Grand, etc.*, 109 Mass., 88.

68

[Law Reports, 10 Exchequer, 92.]

Feb. 11, 1875.

[IN THE EXCHEQUER CHAMBER.]

92] *MILL V. HAWKER and Others, and WICKETT⁽¹⁾.*Trespass—Highway Board—Individual Corporators—District Surveyor—Personal Liability*—5 & 6 Wm. 4, c. 50, 25 & 26 Vict. c. 61.

At a meeting of the members of a highway board it was resolved that a path running through land in the occupation of the plaintiff was a highway, and that the plaintiff be directed to remove a lock from a gate placed across it. The surveyor of the board was afterwards ordered by them to remove the lock, and did so. On the trial of an action of trespass brought by the plaintiff against the members of the board in their personal capacity and the surveyor, in which the defendants justified, Kelly, C.B., nonsuited the plaintiff on the ground that neither the members of the board nor the surveyor were liable individually. No evidence was therefore given in support of the plea of justification. The Court of Exchequer (Kelly, C.B., dissenting) having set aside the nonsuit and ordered a new trial on the ground, first, that assuming that the resolution was illegal the members of the board who concurred in it were personally responsible; secondly, that the fact that the surveyor was, by 25 & 26 Vict. c. 61, s. 16, bound to obey the orders of the board, did not excuse him if in obeying their orders he did an unlawful act:

Held, by the Exchequer Chamber (expressing no opinion as to the liability of the members of the board), that the surveyor was liable, and that the judgment setting aside the nonsuit must therefore be affirmed.

APPEAL by the defendants from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit⁽²⁾.

The facts are fully stated in the report of the case in the court below, and may be sufficiently understood from the head-note to the present report.

Feb. 10, 11. *Kingdon, Q.C. (Lopes, Q.C., and Pinder with him)*, for the defendants: First, the defendants, who 93] are members of the *highway board, are not personally liable. [It is unnecessary to refer to this part of the argument, as no judgment was given on the point.] Secondly, Wickett, the surveyor of the highway board, is not liable. By the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 16, it is enacted that the surveyor "shall in all respects conform to the orders of the board in the execution of his duties." He is therefore bound to obey the commands of the board, and his position is analogous to that of a bailiff or other officer executing the process of a court of justice. It has always been held that such an officer may in an action of trespass justify under the process of the court, though it had no foundation in point of fact: *Dews v. Riley*⁽³⁾: *Andrews v. Maris*⁽⁴⁾. The surveyor is a public officer acting for a public body.

⁽¹⁾ Affirming 10 Eng. Rep., 468.⁽²⁾ 11 C. B., 434; 20 L. J. (C.P.), 264.⁽³⁾ Law Rep., 9 Ex., 309; 10 Eng. Rep., 468.⁽⁴⁾ 1 Q. B., 8.

[BLACKBURN, J.: The Chief Baron having nonsuited the plaintiff, I think we must assume that the path in question was not a highway. It follows that the board acted without jurisdiction. And though the surveyor must obey the board, it is "in the execution of his duties."]

The immunity of a judicial officer does not depend upon the process being within the jurisdiction of the court: *Moravia v. Sloper* ⁽¹⁾. Under s. 17 of the act the board are to keep in repair the highways within their district. It is therefore for the board to determine, as between themselves and their officers, which are the highways. The surveyor cannot inquire whether any order given to him is legal or not.

[BLACKBURN, J.: He has two courses. He can insist upon an indemnity before acting, or he may require the board to have recourse to legal process.]

It is unreasonable to require that the surveyor should be satisfied that any act which he is called upon to perform is within the jurisdiction of the board; it is enough that it is apparently within their jurisdiction.

Arthur Charles (*H. T. Cole*, Q.C., with him) first argued the question as to the personal liability of the members of the board. Secondly, with regard to the surveyor, he is liable as the hand which did an illegal act. The act 5 & 6 Wm. 4, c. 50, ss. 69, *73, 74, contains provisions which [94 show that in the case of supposed obstructions to a highway, it was intended that the surveyor should not act *mero motu*, but should make complaint to the justices. The defendants' argument upon s. 16 of the later act must go the length of saying that the surveyor must accept the orders of the board, no matter what they are. The case has no analogy with that of the execution of process by officers of courts of justice. It is subject to the ordinary law of master and servant.

He also repeated the arguments urged in the court below. *Kingdon*, Q.C., in reply.

BLACKBURN, J.: This action was brought against several defendants, one of whom was the surveyor of the highways and the others members of the highway board, which is made a corporation by the late statute. The Lord Chief Baron at the trial decided, for reasons which I will consider presently, that the action would not lie against either of the defendants—neither against the surveyor nor the rest; and he directed a nonsuit, the question as to whether the place in dispute was a highway not being discussed. Upon application to the Exchequer, the majority of that court (the Lord Chief Baron dissenting) set aside the nonsuit, and ordered a

(1) Willis' Rep., 30.

1875

Mill v. Hawker.

new trial on two distinct grounds. They thought the Chief Baron wrong in saying that the surveyor was protected, and that no action would lie against him, and that he was also wrong in saying that no action would lie against the corporators. Now, the appeal before us is from that decision; and we are all of opinion that, as regards the surveyor, the nonsuit was wrong, and that the rule ordering a new trial was right. And inasmuch as it was one nonsuit, where the parties were sued together in a single action, the decision that the nonsuit was improper as regards one, sets it aside as regards all, and consequently the judgment making the rule absolute must be affirmed. In arriving at this conclusion we proceed upon the ground that the surveyor was clearly liable.

Now, with regard to the other question which has been raised and discussed, as to whether the corporators were liable, it is one of considerable importance and great difficulty. 95] If it were necessary *to decide that question, we should require time for consideration, and possibly, when we had considered it, our decision would not be unanimous. Our decision would be of no assistance in sending the case down to trial, and would perhaps be an embarrassment to the learned judge who may have to try it. We think it better, therefore, to leave the decision of the Court of Exchequer upon that point as it is. We leave it with the authority it had before, no better and no worse. On the new trial the facts will be ascertained, and the point reserved in such a manner that the court before which it comes will be much better able to deal with it than they would be if they were to consider it now.

I will now shortly give my reasons for thinking that the surveyor is liable; and in stating those reasons I believe that I express the opinions of all the judges. If the board had authority given to them by the statute to determine whether a disputed highway was a highway, and consequently were authorized to break into a close where they supposed that there was a highway, but where there was not a highway, though they honestly and *bona fide* believed there was; if there had been any such authority given to them, and if the surveyor was acting under their orders, I should apprehend that he would be protected. Sect. 16 of 25 & 26 Vict. c. 61, enacts that "the district surveyor shall act as the agent of the board in carrying into effect all the works and performing all the duties required to be carried into effect or to be performed by the board." If the board had authority given to them to enter into a close where there was no high-

way, but where they really believed there was a highway, and they directed their surveyor to go there, that would be a duty in which the surveyor would be directed to act. But then the section goes on—"and he shall in all respects conform to the orders of the board in the execution of his duties." If the statute said to a man, "You are to obey the orders of a particular person," it would be very hard to punish him if he did not obey those orders, and at the same time to make him liable if he did obey them. But when you come to look at the matter, the board must have some power or duty to order what is to be done, and the surveyor, who is to do it for them, is to obey their directions. The act does not say that when the board think *that they have an [96 authority, but have not that authority, that the surveyor is to act upon their directions, and, consequently, that while acting on their directions he is to be protected.

Now, as to the question whether any jurisdiction or authority is given to the ancient surveyor of highways, and to the highway board which is substituted for him, to break into a close which is private property, but where they think there is a highway, one is somewhat embarrassed through not knowing on what ground the board believed this path to be a highway. No board has power to decide whether a certain way is a highway; but they may, if they like, or anybody may, if he likes, raise the issue at common law and have it decided. There are provisions in this statute under which the question whether a certain place is a highway may be brought before the justices for decision, but there is no power for any board or other officer to decide it. Any one acting upon such a decision, does so at his peril. Mr. Kingdon endeavored to point out some section which gave this power. I can see none. Mr. Charles argued that even if it had been a highway, the surveyor had no right to remove the obstruction. How that would be I do not say; it is not the question here. We must, in favor of the plaintiff, assume that if he had not been stopped he would have proved that this was not a highway; and if he had proved that it was not a highway, the question whether the surveyor would have the right to remove an obstruction across a real highway, would not have arisen. Here a gate on a close, which has not been proved to be a highway, has been broken through, and there is no clause in the act of Parliament which says that this can be done. It does not give the board a right to remove something from *that which is not a highway, but which they think is a highway. If this be the case, the ground on which the Chief Baron held that the surveyor

1875

Mill v. Hawker.

was not responsible, seems totally to fail. The exception is only that of people acting for courts of justice, or perhaps where any act of Parliament says that they must in all events obey. But it certainly does not apply to such a case as the one before us, where the act only says that the surveyor shall obey lawful orders. For these reasons I think that the judgment of the court below ought to be affirmed; but we must only be taken to add the confirmation of a court 97] of appeal to *that part of the judgment which proceeded on the ground that the surveyor was liable.

MELLOR, J.: I am of the same opinion. I think the true limit of the surveyor's obedience is while the board is acting legally, not when it is acting illegally. Where he is protected from the consequences of any act, the board are protected, but if the board order him to do anything which it is beyond their power to order, then I take it that he is no longer protected. I take this to be the meaning of s. 16, and I agree that the judgment of the court below, so far as the surveyor is concerned, should be affirmed.

LUSH, J., concurred.

GROVE, J.: I also agree in the opinion which has been expressed. It is admitted for the purposes of this part of the case that the board is liable in its corporate capacity for an act which, for the purposes of the case, is admitted to be unlawful; and here the surveyor commits that unlawful act, for which he should be held legally responsible. Therefore the whole question—for no other question has been brought to bear upon the matter—is whether by s. 16 he is exempted from that liability. [The learned judge read the section.] It seems to me that it would be straining the act to say that the section actually exempts the surveyor from all legal liability. If the rendering which is contended for by Mr. Kingdon were adopted, it would virtually give him such an exemption, for I do not see any words in the section which would limit that exemption. But I see nothing to give it a wider limitation than that of things lawfully ordered by the board. It is confined to carrying into effect the duties by the act required. No case has been cited by Mr. Kingdon in support of his argument except the case of officers executing legal process, and acting in the execution of duties conferred upon them by courts of law. This seems to me to show that the exemption claimed here is not an exemption which would be likely to exist, for if it had we should probably have had some cases more expressly in point. I think I ought to add that I have entertained some doubt as to whether the court ought not to have given judg-

ment on both points, but that doubt is not sufficient to *induce me to differ from the rest of the court, more [98 especially as the court will be in fuller possession of the facts after the trial.

DENMAN, J.: I am of the same opinion. The question as to the liability of the surveyor seems to me to depend entirely on the words of 25 & 26 Vict. c. 61, s. 16, and the words relied upon by Mr. Kingdon are these: "He shall in all respects conform to the orders of the board in the execution of his duties." To ascertain the real meaning of these words we must go to the earlier part of the clause, which says: "he shall act as the agent of the board in carrying into effect all the works and performing all the duties required to be carried into effect, or to be performed by the board." What are those duties? They are duties relating entirely to public highways, and for the purposes of this case we are bound to assume that the particular place in which the surveyor attempted to execute his duties on the occasion complained of, was a place which was not a public highway. If so, I think it follows from the reasons given by my Brother Blackburn, that the board had no jurisdiction over that place. Then, if the board had no right to do what they did, had the surveyor any right to act under their authority in the manner complained of? Well, the words are, "he shall in all respects conform to the orders of the board in the execution of his duties." If this was not a highway, he would have no duties there at all, and he cannot therefore resort to this clause as affording him a protection. The cases relied upon have been cases of a peculiar kind. The case of *Dews v. Riley* (¹), and the case of *Andrews v. Marris* (²), the only two which told in favor of Mr. Kingdon, were cases relating merely to duties performed by officers under the orders of a court of justice. These cases are not applicable to the present case, but the general rule is applicable, that a man who has done a wrong is responsible for that wrong. Here the surveyor has done an act upon an object with which he had no duty to interfere. Therefore he, at all events, is responsible.

With regard to the question as to the corporators being personally responsible, I think that is a matter of great difficulty, and that it would be better not to send down the case with a divided *opinion, or, by taking time to con- [99 sider, to prevent the case from being tried at the next assizes.

ARCHIBALD, J.: I entirely agree as to the inexpediency of taking time to consider the question as to the personal lia-

(¹) 11 C. B., 434; 20 L. J. (C.P.), 264.

(²) 1 Q. B., 3.

1875

Radley v. London and North Western Railway Co.

bility of the corporators, as to which there may probably be some difference of opinion. As regards the surveyor, it appears, to me that the effect of s. 16 is to make him the executive of the board, and any orders which he may receive to carry out their lawful duties, are orders which he ought to obey. If they go beyond this limit he ought not to obey them, and would not be justified in obeying them. Here it is admitted that the spot in question was not a highway; and nothing has been cited to show that the board would be justified in committing a trespass upon land which is not a highway. Consequently, this was no part of their duties; and I think it was no part of the duty of the surveyor to obey their orders to commit that trespass. For these reasons I agree that the judgment of the court below on this point should be affirmed.

Judgment affirmed as regards the liability of the surveyor.

Attorneys for plaintiff: *Pattison, Wigg & Co., for White & Dingley, Launceston.*

Attorneys for defendants: *Coodé, Kingdon & Cotton, for Hawker, Boscastle.*

It is well settled that a servant is liable for an illegal act done by command of his master: Addison on Torts (4th ed.), 70, 384, 506, 935; 2 Hilliard on Torts (4th ed.), 447.

Though the master be also liable: Addison on Torts (4th ed.), 388; 2 Hilliard on Torts (4th ed.), 405.

And a joint action lies against the

master and the servant: 2 Hilliard on Torts (4th ed.), 31; *Montfort v. Hughes*, 3 E. D. Smith, 591; *Phelps v. Wait*, 30 N. Y., 78, 79; *Bruff v. Mah*, 36 N. Y., 205; *Creed v. Hartmann*, 29 N. Y., 591.

Otherwise in Massachusetts: *Parsons v. Winchell*, 5 Cush., 592.

[Law Reports, 10 Exchequer, 100.]

Feb. 9, 1875.

[IN THE EXCHEQUER CHAMBER.]

100] *RADLEY and Another v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY (').

Contributory Negligence—Railway Bridge.

The plaintiffs, colliery owners, had a siding adjoining the defendants' line, which was crossed by a bridge, and on to which the defendants were in the habit of conveying the plaintiffs' empty trucks from their line, the plaintiffs removing them as they thought fit. The defendants were accustomed to bring such empty trucks along their main line at any hour by day or night, and, without notice to the plaintiffs, to shunt such trucks on to the siding and leave them there to be disposed of by the plaintiffs. One Saturday evening, after working hours, the defendants brought on to the plain-

(¹) Reversing 8 Eng. Rep., 516.

tiffs siding and left there trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at the plaintiffs' works, the defendants, after dark, pushed on to the siding other trucks of the plaintiffs which pushed the loaded truck up to the bridge, by which means the further progress of the train of trucks was checked. The engine-driver, believing that the obstruction was caused by a break, drew back the engine, and gave with it such a push to the train that the loaded truck knocked down the bridge. In an action for the damage so done, the jury found that the plaintiffs were guilty of contributory negligence in not removing the loaded truck:

Held, by the majority of the Exchequer Chamber (Denman, J., dissenting), reversing the decision of the Court of Exchequer, that there was evidence of contributory negligence to go to the jury.

APPEAL by the defendants from a decision of the Court of Exchequer making absolute a rule for a new trial on the ground of misdirection, and that there was no evidence of contributory negligence to go to the jury (*).

The cause was tried at the Liverpool Summer Assizes, 1873, before Brett, J., when the following facts were proved:

The plaintiffs are colliery proprietors owning and working the Sanky Brook Colliery, close to which there was a mineral branch of the defendants' railway called the Parr Branch.

In connection with the Parr Branch there are certain sidings on the land of the plaintiffs, and belonging to them, made by them for convenience of transferring and carrying coal raised from their colliery to and by the defendants' line of railway.

*Upon these sidings of the plaintiffs no engine of the [10] defendants was accustomed to run throughout, and they were used solely, as far as the defendants were concerned, for placing therein returned empty wagons by the defendants and removing wagons therefrom when filled with coal. Wagons once left on these sidings by the defendants were entirely within the control of the plaintiffs.

The defendants were accustomed to bring empty returned wagons along the Parr Branch at any hour by day or night, and without notice to the plaintiffs to shunt such wagons on to the plaintiffs' sidings where they were left under the plaintiffs' control.

Part of the sidings was crossed by a bridge used as a tramway, about eight feet in height from the level of the rails, on which rested part of the head gearing and supports necessary for the working of the plaintiffs' colliery.

An empty wagon, or one loaded in an ordinary way with coal, could pass safely and clearly under this bridge, and wagons were occasionally shunted under it by the defendants, but when they did so it was complained of by the

(*) Law Rep., 9 Ex., 71; 8 Eng. Rep., 516.

1875

Radley v. London and North Western Railway Co.

plaintiffs, on the ground that wagons so left blocked up a public highway called Fleet Lane which crossed the siding between the railway and the bridge.

At the plaintiffs' colliery it was the ordinary custom to leave off work at 12.30 P.M. on Saturdays and to resume at 6 A.M. on Mondays. About 2.30 P.M. on Saturday, the 25th of January, 1873, the defendants brought three or four empty wagons of the plaintiffs, together with a disabled wagon of the plaintiffs loaded upon another wagon, and marked "home for repairs," along the Parr Branch, and shunted them on to plaintiffs' siding, and left them there.

The height of the wagon, with the disabled wagon loaded on it, was about eleven feet in all, too high to pass under the bridge before mentioned.

The disabled wagon loaded up on the other, and the two or three others, were known to a person left in charge of the plaintiffs' works during the absence of the workmen at 2.30 on Saturday, the 25th of January, to be on the siding, and were left standing there during Saturday afternoon and up till and during Sunday night, the 26th, and it was known to him that a number of wagons would arrive during that night.

[102] *On the night of Sunday, about 12.30, the defendants brought up on their line a train of forty-eight empty wagons of the plaintiffs, and proceeded to shunt them on to plaintiffs' siding; but the night being very dark, the defendants' servants engaged in shunting did not notice that the loaded-up wagon was different from any other wagon in height.

The train of wagons was slowly backed along the siding, and coming against the wagons which had been left by the defendants on the previous Saturday, pushed them over Fleet Lane towards the bridge, so as to cause the loaded-up wagon to strike against the bridge, which checked the further progress of the train.

On touching the bridge the engine-driver felt an obstruction, and not having got all the wagons off the main line, which it was his duty to do, and believing the obstruction to be caused by a break, he, to use his own words, drew back the engine and gave another jamb up; by this he gave such a momentum to the engine that the loaded-up wagon knocked down and carried away the bridge and head gearing, which was the accident complained of by plaintiffs.

A guard in charge of the empty wagons was, whilst they were being shunted as above described, seated on one of the wagons about the middle of the train.

The plaintiffs had also a siding on the east side of the defendants' line, on which empty wagons were from time to time shunted by the defendants, and on which the wagons brought on the Sunday night might have been put.

At the trial the contention on behalf of the defendants was that there was no negligence on their part, and even if there were, there was contributory negligence on the plaintiffs' part, inasmuch as, knowing that wagons might arrive at any hour of the day or night, and that in fact they were expected to arrive on the night of the 26th, it was their duty to have removed the loaded-up wagon and to have the siding clear; the plaintiffs, on the other hand, contended that there was no such duty on their part, and that there was no evidence of contributory negligence.

[The case on the appeal then set out a shorthand writer's note of the summing up of Brett, J., which is omitted, as not being required for the purposes of this report.]

*In reply to questions left by the learned judge to [103 the jury, they replied: "We think there was contributory negligence on the part of the plaintiffs." And the learned judge thereupon directed the verdict to be entered for the defendants. A rule for a new trial having been made absolute, as before stated, the defendants appealed.

Aspinall, Q.C. (*McConnell* with him), for the defendants: The decision of the court below, that there was no evidence of contributory negligence, is wrong. The accident was caused by the plaintiffs' omission to remove the loaded truck. If this truck had not been allowed to remain on the siding, nothing which the defendants' servants did would have caused any mischief. He cited *Davies v. Mann* ⁽¹⁾; *Tuff v. Warman* ⁽²⁾; *Walton v. London and Brighton Railway Company* ⁽³⁾.

Herschell, Q.C. (*Baylis* with him), for the plaintiffs: The decision of the court below was right. The defendants, having left the loaded truck after working hours on the plaintiffs' siding, had no right to assume that this truck had been removed by the plaintiffs. There was no obligation on the part of the plaintiffs to remove it during non-working hours, and the defendants had no right to throw on them the burden of taking extraordinary measures. Even assuming that the plaintiffs ought to have removed the loaded-up truck, the defendants ought not to have forced it against the bridge, in the manner they did, without ascertaining the

⁽¹⁾ 10 M. & W., 546.

⁽²⁾ 2 C. B. (N.S.), 740; 26 L. J. (C.P.),

268; in error, 5 C. B. (N.S.), 573; 27 L. J. (C.P.), 322.

⁽³⁾ 1 Har. & Ruth., 424.

1875

Radley v. London and North Western Railway Co.

cause of the obstruction. The plaintiffs were not bound to anticipate that the defendants would use the siding as they did, without ascertaining that it was clear. The defendants have not shown that they were in the habit of leaving disabled wagons on the siding, which they had a right to expect would be taken away. Secondly, there was a misdirection at the trial, and the law, as laid down in *Davies v. Mann*⁽¹⁾, was not sufficiently explained to the jury. He cited *Bridge v. Grand Junction Railway Company*⁽²⁾; *Dimes v. Petley*⁽³⁾.

Aspinall, Q.C., in reply.

104] *BLACKBURN, J.: In this case the rule in the court below for a new trial was made absolute on two grounds, the principal one being that the court thought that there was no evidence of contributory negligence, by which I understand any neglect of duty or conduct on the part of the plaintiffs sufficient to disentitle them to recover in this action; the second, that assuming that there was any such evidence, the case was not properly left to the jury. The majority of the court, I think, are of opinion that on neither ground was the court below right.

I will first state the question, which is really the important one, whether there was evidence which, if properly left to the jury, would take from the plaintiffs the right to recover, assuming that the defendants were guilty of negligence. I believe that there is no dispute, and that for many years there has been no conflict of authority as to what really is the law upon the subject. I think that all the cases uniformly agree in this, that though the plaintiff, or the person who complains of negligence, may himself have been guilty of negligence, and may have put his property in some place where it is exposed to danger, though leaving it there was negligence on his part, yet that does not disentitle him to recover for the consequences of negligence on the part of other persons, which has injured him or his property. A man is bound, when he puts himself in a place where he knows other persons are coming, and are in the habit of coming, not only for his own safety, but for that of his neighbors, to take reasonable care of himself and of his property; but, whether he does this or not, it does not relieve anybody else who comes there from the duty of also taking reasonable care.

In the case of *Davies v. Mann*⁽¹⁾, where a fettered donkey was lying on a high road, and a man came driving furiously past in a way which, if it had been an unfettered donkey or

⁽¹⁾ 10 M. & W., 546. ⁽²⁾ 3 M. & W., 244. ⁽³⁾ 15 Q. B., 276; 19 L. J. (Q.B.), 449.

a man, would have made him liable to be run over, it was held, although no doubt the accident could not have happened if the donkey had not been there, though no doubt it was negligence on the part of the owner of the donkey to leave it fettered there without any assistance, yet this did not excuse the defendant for driving over it, and did not disentitle the owner of the donkey to recover damages. *So [105 in the similar case of a drunken man who might be lying on the highway, if anybody carelessly driving on the road drove over him, he would have to pay damages, because the drunken man did not lose his right of action by his negligence.

It comes, therefore, to this: was there evidence here which showed that the plaintiffs were guilty of negligence, and that the negligence was directly a part of the proximate cause of the accident? I think there was. We must look at the statement of facts. In the first place, this high wagon, loaded with a broken wagon, is put on the siding on the Saturday afternoon. There it stood, and the plaintiffs had possession of it. They knew perfectly well that the course of business was that the railway servants came in the night and in the dark, and brought the wagons to this very same siding; and they also knew, for I think this appears to be pretty clear, that when other wagons were standing there they shoved them back, in order to bring others to take their places; and they must have known that a high wagon of this sort, if it were driven back so far as to go under the bridge, would be liable to beat against the bridge, and thus to cause mischief. This being the state of things, the first question seems to be, was it negligence on their part to keep that high wagon standing there from the Saturday night until the Monday morning? because that is what they did, the accident happening on the Sunday night, in the dark. I think it was negligence, and there was an absence of reasonable care on their part, knowing that the railway company's servants were likely to come there and send their wagons there.

Now I think it was carefully left to the jury, and they were properly told that the question was whether the plaintiffs had done what a reasonable man would have done, or omitted to do something that a reasonable man under the circumstances would do. If so, they were guilty of negligence.

The question was asked, would a reasonable man, under the circumstances, have left that high wagon there (because it was its height which made it dangerous), standing, as it

1875

Radley v. London and North Western Railway Co.

did, for thirty-six hours without removing it? It is true that it was after working hours, and after the workmen had left the colliery, but would a prudent man have removed it from the siding? The question was clearly one for the jury, [106] and the jury have rightly answered it by *finding that there was negligence. But then it does not follow that the defendants might not be liable. The strongest evidence of their negligence is this, when they were pushing the wagons into the siding and felt a stoppage, which, as we know, was the high wagon coming against the bridge, they concluded that the bridge was high enough to pass under, took back the engine and then brought it with such an impetus, that the trucks were shoved forward against the bridge, and brought it down. This was certainly evidence for the jury of negligence on the part of the defendants, and if they thought that this negligence, notwithstanding the fact that the high wagon had been left there, was the proximate cause of the accident, the defendants would have been responsible. But that question was substantially left to the jury. It was pointed out in terms sufficient to bring the question before them, that there was no negligence on the part of the defendants in what they did, unless they knew the high wagon was there. "Do you think," says the judge, for it is put in so many words, "that when the defendants knew, or rather the defendants' servants who left it there on the Saturday night knew, that it was there, that it was negligence in the defendants' servants, and consequently in the company, not to leave warning to the other men that came up, to tell them, 'There is a high wagon up there, look out for it.'"

It is left to the jury whether that is negligence on the part of the railway company. Then it is left to them. "Was it negligence on the part of the other servants of the railway company to push up the wagons in this way without sending down a man to see where the obstruction was?" All this amounts to saying that the negligence on the part of the defendants depends upon this, whether or not they were aware there was this high wagon, or ought, as reasonable men, to have anticipated that possibly it was there. For if not, there is nothing on their part but what takes place in the ordinary course of business. If that is so I venture to say it is not a question about words, but there was a state of things which would disentitle the plaintiffs to recover, because I think it would appear that not merely the negligence of the plaintiffs in leaving this high wagon standing there was a *causa sine qua non*, a cause without which the thing would not have happened, for it clearly would not have hap-

pened unless the *high wagon had been standing there, [107 but also that if the mischief would not have happened but for that negligence on the part of the plaintiffs, and all that was imputed to the defendants was dependent upon this, whether or not they ought to have supposed that the high wagon was there, then, if the defendants had no reason to believe that it was there, they were guilty of no negligence at all, and consequently the plaintiffs' negligence in leaving it there was the proximate cause of the accident, and not merely the *causa sine qua non*. The distinction between this and *Davies v. Mann* (¹), and that class of cases, is that though the donkey, which was left there, was the *causa sine qua non*, yet the defendant was guilty of negligence in driving furiously and in a way which would have been negligent even if there had been no donkey there, because he had every reason to expect that other people would come there, and even if an unfettered donkey had been there, although it might have got out of his way, yet it would have been liable to be run over, and therefore the defendant was guilty of negligence. Then the question comes to be, could the plaintiffs avoid the consequences of the defendants' negligence? This being so, I cannot agree with the court below, that there was no evidence of such a state of things as to disentitle the plaintiffs to recover.

Then comes the question whether the judge gave a sufficient direction to the jury. Now I must disclaim the idea that any learned judge is bound to follow a particular form of words: the direction should be such as to convey to the jury the real question. [The learned judge then referred to the direction of Brett, J., and expressed his opinion that it was sufficient.] The result is that the judgment of the court below will be reversed.

MELLOR, J., concurred.

LUSH, J.: I am of the same opinion. I would only add, as to the first ground, that the court below came to the conclusion that there was no evidence of contributory negligence to be left to the jury, by assuming that it was out of the power of the plaintiffs to remove that wagon between the time when it was left there on the afternoon of the Saturday, and the Sunday night at the time of *the accident; [108 but there is no evidence in the case to warrant any such assumption, and I am unable to see, as matter of law or as matter of experience, that it was impossible for the wagon to be removed. If it could, it ought to have been. This

(¹) 10 M. & W., 546.

1876

Radley v. London and North Western Railway Co.

was a question for the jury, but my Brother Bramwell in his judgment takes it for granted, and it is the foundation of his judgment, that it was not practicable to remove the wagon between the Saturday afternoon and the Sunday. Then my Brother Bramwell also thinks, I observe, that the point which arose in *Davies v. Mann* ⁽¹⁾ was not put to the jury. But I think that it was. In this particular case you could not approach the question of the defendants' negligence without involving in it the supposed negligence of the plaintiffs. Had the wagon not been there, the accident would not have happened. The supposed negligence is only in shoving on the train without ascertaining whether or not a high wagon was in the way; whether they should have ascertained that it was there, or known it was there, or sent a man down to know what was the matter before they shoved on the other wagons, were all questions for the jury.

My Brother Grove, who is obliged to attend an official appointment, desires me to say that he concurs in this judgment.

BRETT, J.: I can only say that I cannot see that what I did was wrong, though I have no doubt that what I did might have been much better done.

DENMAN, J.: I cannot come to the same conclusion as the rest of the court. I feel convinced that I must be mistaken, because I find that all my learned brethren differ from me, still it is my duty to give the ground of my opinion. I think on both grounds the judgment of the court below is right. With regard to the question of whether there is evidence of contributory negligence here which should disentitle the plaintiffs to a verdict, I do not found my view on the ground that there was not some evidence of what might be considered negligence on the part of the plaintiffs. I think that it was quite open to contend that the plaintiffs, through their servants, were guilty of negligence [109] in leaving that *wagon unattended to during so long a time as they did, but I do not think that every sort of negligence of which a plaintiff may be guilty is necessarily contributory negligence such as would deprive him of the right to recover. I think cases may be easily put in which no one would doubt that though there was negligence, it was so far removed from anything to do with the cause of the accident, that the plaintiff would not thereby be prevented from recovering; and I cannot help thinking, where it is perfectly plain that the accident happened owing to some definite and

(1) 10 M. & W., 546.

affirmative act on the part of the defendant constituting negligence, that then it will not do to say that the plaintiff was guilty of some act of negligence without which the accident would not have happened, because without it the thing to which the accident happened would not have been in that place. Therefore I think that in every case, before the judge leaves the question of contributory negligence to the jury, he ought to be satisfied that there is something which might or could be reasonably held by them to be, properly speaking, the cause of the accident. Now undoubtedly this truck would not have been injured, or have injured the bridge, if it had not been there where it was placed by the defendants, and left without any interference on the part of the plaintiffs during many hours. But it strikes me, upon the evidence, that it is as clearly made out as anything can be that the accident was not, in any common sense view of the matter, due to that, but that it was due to an affirmative act on the part of the defendants which we must take to have been found by the jury, because the question of contributory negligence does not arise until the negligence of the defendant is supposed to have been settled and found by the jury. The negligence, from which the accident happened, was charging the bridge with a quantity of trucks at the end of which was the truck in question, and when it was found that the trucks came to a standstill, not being content to stop and look to see what was the cause of the stoppage, but pushing violently with an engine the whole train with that unknown stoppage at the end, and so throwing down the bridge. It appears to me, therefore, that though there may have been some negligence on the part of the plaintiffs, it was not negligence which in any sense caused the accident, but that it was entirely the affirmative act of the defendants' servants, in charging the bridge as they did; and therefore, [110 although there is some evidence of negligence, there is nothing that ought to be considered in point of law as evidence of contributory negligence.

The court below, though they did not put the case exactly in so many words as I put it, seem to have put it in substance the same way. They did no doubt rely upon the fact that during the intermediate time nothing could have been properly done. At all events, it is sufficient to say that there is no evidence, as it seems to me, of anything unlawful or wrongful on the part of the plaintiffs in leaving the wagon there between one day and the other. Then, secondly, the question arises whether the jury were misdi-

1875

Radley v. London and North Western Railway Co.

rected. [The learned judge referred to the summing-up, and expressed his opinion that it did not sufficiently explain the law (as laid down in *Tuff v. Warman* (')) to the jury.] I agree, therefore, with the judgment of the court below.

ARCHIBALD, J.: I agree in the opinion of the majority of the court. The rule below was made absolute on the ground of misdirection. The misdirection, as I understand the case, appears to be that there was no evidence of contributory negligence on the part of the plaintiffs, and that the learned judge ought to have told the jury so; but on the argument here, not only is that point taken, but it is also insisted that the learned judge failed to explain sufficiently to the jury the effect of contributory negligence on the part of the plaintiffs. Now, I quite agree with the authorities cited, that it is not every species of contributory negligence on the part of the plaintiff (at least it is not under all circumstances) which will excuse the negligence of the defendant; and although there may be negligence on the part of the plaintiffs which does in fact contribute to the accident or the mischief, yet, if the defendant might by reasonable care and caution have avoided it, he will nevertheless be liable. I think the question has been in substance sufficiently left to the jury and explained to them by the learned judge.

I also agree that there was in this case evidence to be submitted to the jury of negligence on the part of the plaintiffs. [11] Adopting *that view, there comes the question, what was the conduct of the defendants in the case? If they had rashly, without any care at all, driven this train of empty carriages into the siding, and recklessly and carelessly driven the high carriage against the bridge, I can quite understand circumstances under which they might be answerable, although there was negligence on the part of the plaintiffs in leaving the carriage there. But the question would be, what was the conduct of the defendants? Did they take such measures and precautions as they ought to have taken, assuming the existence of negligence on the part of the plaintiffs? That is the exact question which the learned judge left to the jury. He called their attention to the question of what ought to have been done in the exercise of ordinary care, and what should have been the conduct of the defendants on the occasion. [The learned judge proceeded to comment upon the terms of the summing-up.] I think, therefore, that there was no misdirection, and that there was evidence for the jury of contributory negligence, and

(¹) 2 C. B. (N.S.), 740; 26 L. J. (C.P.), 263; in error, 5 C. B. (N.S.), 573; 27 L. J. (C.P.), 322.

that upon both grounds the judgment of the court below ought to be reversed.

Judgment reversed.

Attorneys for plaintiffs: *Sharpe, Parker & Co., for Peace, Wigan.*

Attorney for defendants: *R. F. Roberts.*

[Law Reports, 10 Exchequer, 112.]

Feb. 9, 1875.

[IN THE EXCHEQUER CHAMBER.]

*THORN V. THE MAYOR AND COMMONALTY OF THE [112
CITY OF LONDON(¹).]

Engineering Contract—Plans and Specifications—Mode of Construction—Impossibility of Execution in Mode Specified—Implied Covenants.

The defendants being about to construct a bridge across a tidal river, employed an engineer for the execution of the works, and specifications and plans and drawings of such works were prepared by him. The defendants then issued an advertisement inviting tenders for the execution of the works comprised in the specification, plans, &c. By the specifications the foundations of the piers were to be put in by means of caissons, as shown in a drawing; the form and dimensions of the ironwork and size of rivets to be as shown on the drawing, or to be thereafter supplied by the engineer, &c. By the deed, after reciting the specifications and tenders, the plaintiff covenanted that he would complete the work, according to the terms of the specifications, within three years. Power was given to the defendants' engineer to alter the mode of executing the work, and it was provided that if additional expense was incurred by such alteration, the plaintiff was to receive compensation, to be fixed by the engineer.

The plaintiff commenced the work, and after he had incurred great expense, it was found that the work could not be executed by means of the caissons in the manner specified, and by the directions of the engineer a new mode of putting in the foundations was carried out. The plaintiff having brought an action to recover the value of the work which was thereby thrown away:

Held, by the Exchequer Chamber (affirming the decision of the court below), that no warranty by the defendants that the work could be executed in the manner described in the plans and specifications, was to be implied.

Per Blackburn and Mellor, JJ., that the mode of laying the foundation by means of caissons was not part of the contract, but only a mode of carrying it out, which the engineer had power to alter.

Per Brett, J., that this mode of laying the foundations was a substantive part of the contract, and that the plaintiff could only be required to pursue a different mode under a new contract.

ERROR upon a judgment of the Court of Exchequer in favor of the defendants (²), where the facts are fully stated.

Feb. 8. *Benjamin*, Q.C. (*Littler*, Q.C., and *J. W. Batten*, with him), for the plaintiff, repeated the arguments urged in the court below.

Giffard, Q.C., (*Thesiger*, Q.C., and *Makenzie*, with him), for the defendants.

(¹) Affirming 9 Eng. Rep., 475.

(²) Law Rep., 9 Ex., 163; 9 Eng. Rep., 475.

1875

Thorn v. Mayor, &c., of London.

[113] *Feb. 9. BLACKBURN, J.: In this case, which was argued yesterday, we are all of opinion that the judgment below ought to be affirmed, though I must not say that we are all agreed as to the reasons for affirming it. I have reasons of my own which, I believe, are those of the majority of the court, but which may be qualified by what my learned brothers may say when they have heard my judgment.

The plaintiff, who is a contractor, entered into an agreement by a formal indenture, in which there are various covenants. It begins by reciting, as the fact was, that there had been previously issued on behalf of the corporation specifications, in which they described the kind of work for which they were inviting tenders, and the indenture contains a covenant on the part of the plaintiff that he would complete the work; not making the specifications part of the contract, but that he would complete the work in the manner described in the specifications, and do the work according to the terms of the specifications; and there is in the indenture a condition that if the mode of doing the work is altered, which it may be, and power is given to the engineer to alter it, the contractor shall do it in that altered mode, and that if in consequence of the alteration he may have incurred any additional expense in doing the work (of which the engineer is made sole judge), he shall receive compensation, of the amount of which the engineer is also to be sole judge. There is also a further term in the covenant that he is to execute the work in three years, and that if he delays the completion of the work beyond that time, he is to forfeit £1,000 a month for every month's delay. But there is a further provision, that if the engineer, who is again made sole judge, thinks that the delay has been in consequence of some matter, which is, *inter alia*, by no fault whatever of the contractor, in that case also the engineer, as sole judge, may give further time, and doubtless would do so. Such is the contract, and there is no express covenant whatever that the specification, and the mode mentioned in the specification, shall be one that is practicable. Now the question that arises comes to be this: when we look at the specification we find that the work to be done was to build a bridge—Blackfriars Bridge—across the Thames, a tidal river, as we all know, [114] and it is provided for in the specification, *and pointed out that the foundations are to be laid in a particular way, which I need not further allude to except to say it was quite practicable and successful, and they were ultimately laid. The foundations to the piers were to be laid to the depth of some feet—the precise number does not matter—below the

level of low water, and of course, the tide rising and falling, they would be twenty feet or more below the top at high water. Now, in that state of things, in order to build the piers, it would be, if not indispensable, at all events convenient, to keep the water out around them, so that the workmen might work, in carrying out the work of building the bridge, in a place like dry land, and the well-known mode of doing this would be to have a coffer-dam. This coffer-dam would probably, though it is not expressly stated in the case, be an expensive work, and would certainly occupy part of the room in the river, and as the bridge was to be made under the control of the conservators of the Thames, it was an object to avoid interfering with the water-way more than was absolutely necessary. The specification discloses, and the engineer had doubtless arranged, with a view to what was proposed, that the piers were to be built in this way (I may say briefly I do not pretend to accuracy in it): caissons seven feet in height were to be sunk, between which caissons, when put down, there were interstices, which were made water-tight by means of piles, which would make water-tight compartments seven feet high. On the top of that there was to be second, third and fourth sets of caissons, which would make the water-tight compartment twenty-eight feet high, and which would bring it above the top of the water at high water; and it seems that the proper thickness and the nature of the iron, and everything in those caissons, is mentioned in the specification, so as to show what kind of caissons they were which were intended to be put down, and it appears, and I presume (though not being an engineer I do not say it of my own knowledge) that a person looking at it would understand it was contemplated, when this water-tight compartment was made of the height of twenty-eight feet above the foundation below, that the water might be pumped out once for all, and that then there would be a water-tight compartment twenty-eight feet high, free from water, requiring no further pumping than such as might be required in consequence of any small *leak- [115 age or rain that might fall, not having the tidal water of the Thames coming into it, and then when once that was done the workmen were to build within that dry water-tight compartment a pier, exactly as if it were being built on dry land. It would be in lieu of a coffer-dam, and perhaps it might be called a coffer-dam, only not made in the way a coffer-dam usually is, and I apprehend also—though this, again, is not stated in the case before us—that this mode of doing the work by means of caissons was not the usual and

1875

Thorn v. Mayor, &c., of London.

ordinary way, but was the way devised on this particular occasion, and which it was expected by the engineer would sufficiently answer the purpose which was in the contemplation of the parties. Now when this came to be put into operation, it turned out, either from having under-estimated the force of the tide, or, what is more likely, from having over-estimated the strength of the piles and materials, but for some reason or other which is not explained, when this was done, and it came to be high water, the water broke in, and the workmen could not build in the way which was anticipated. This was clearly no fault of the contractor; and the engineer, after having tried to remedy it in various ways, finally removed the two top caissons, so as to make the water-tight compartment only fourteen instead of twenty-eight feet high, and the consequence was that some of the work done by the contractor was thrown away, for although until the tide had risen fourteen feet there was less than a pressure of fourteen feet of water on the side of the caissons, and it was dry enough, as soon as the tide rose above fourteen feet it filled up the interior of the caissons, and, as is quite obvious, the workmen could not work, but had to wait until the tide fell again, and then, the water being pumped out, they could proceed with the work again. The case states, and it is again obvious, I think, from the statement made, that the consequence of this was that the contractor was put to additional work, labor and expense—how much is not stated—and it is not material whether £100 or £100,000 would be the compensation, for that is immaterial with regard to this point of law. There was no doubt expense; further, there was delay—it is not stated how much—and, as I said before, it is immaterial for our consideration whether this was to be measured by tens or by units.

116] *Now the question arises whether, under the contract as entered into, there was anything which the corporation had made a part expressly or impliedly of the contract which makes them liable to compensate the contractor for this additional delay. It seems to me—I am now speaking for myself, for I believe at least one member of the court does not agree in what I am going to say—that the caissons round the pier were but a mode of carrying out the work; the thing to be done was to build the piers. The mode pointed out in the specification, and the mode in which the contractor was to proceed in the first instance to do the work, was by means of these caissons, but when it was done they were to be removed. I think they were like the scaffolding of a house—not part of what was to be done, but a

mode of carrying it out; and taking it in that way, and supposing it to be so, it would follow that the contractor was bound to do the work in the altered mode which the engineer pointed out, having his recourse for the extra expense to the provision in the contract by which the engineer was to allow compensation for the extra expense, the engineer being sole judge of what it should be. As to whether the contractor was entitled to say, "I will not go on with this mode of carrying out the work," I think he was not so entitled; but supposing him to be so entitled, he did not rely on any such right, he treated the matter as if the engineer had a right to order him to do 'the work in this altered mode, and he did do it in this altered mode, and as far as regards extra expense the engineer, Mr. Cubitt, has given him compensation.

We have no right, had we the materials before us, to review the engineer's decision on this subject. We have not the materials; and he awarded compensation which I have no doubt he thought fair, just, and liberal, and which I hope was so. So far as that is concerned the contractor got paid. But the delay is a separate thing. If there is any contract, express or implied, by which the corporation warranted to the plaintiff that the mode pointed out in the specification, and on which he made his tender, could be carried out—if there was any such contract, express or implied, I say it has been broken, and the damage arising in consequence of delay from this would have to be assessed, and the plaintiff would be entitled to recover.

*Now when you look at the contract, it does not [117 embody the conditions on which Mr. Benjamin in a great measure rested his argument (they are not made part of the contract), all that is done is to refer to the specification for the mode in which the work is to be carried out, but certainly in the contract itself there is no such express warranty, and the question in the case is, are we to imply such a warranty? I think if the case were, which I do not think it is, that the building of the bridge—the thing to be done, in the mode mentioned in the specification—was in fact impracticable, I do not think it would make any difference, but at the same time I should want to consider the matter before I said whether it would make a difference. It seems to me that unless you can find an implied contract that the mode of building it described in the specification is reasonably practicable, there is no case for the plaintiff. Now, taking that view of it, let us see whether there is any ground for implying such a contract. It is true that the contractor, looking at this and knowing it—and we must assume that the con-

tractor, or those who are acting for him, have competent knowledge of the mode in which bridges are generally built—if he saw a new thing substituted for a coffer-dam which had not been tried before, and had said, “I think this will probably work well, but it is a new plan which has never been tried; a new plan will sometimes go wrong,” and had gone accordingly to the corporation, or those who represent them, and said, “I think this will probably work well, and I have made my estimate accordingly; but it may not work well, and therefore I request you to give me an indemnity, in case the mode should prove to be impracticable, and so cause delay and expense;” if he had done that, and they had answered, “We are so convinced that this is all right, that we will warrant this new plan will work practically;” if they had said that, and had embodied it in the contract in express terms, then the plaintiff would be entitled to recover; but there is certainly no such express warranty. If, on the other hand, the corporation had said in express terms, “We will warrant nothing, we think this mode will do. If it proves ineffectual, and you are put to damage and expense, you will have, by the agreement which is proposed to be drawn, the compensation which the engineer thinks fit to allow you, and [118] anything *more we will not warrant at all,” and had put into the contract an express negative of all warranty, it seems quite clear that the plaintiff would have had no shadow of a case at all. The question therefore comes to be,—there being no express statement one way or other in the contract, which states on the face of it that the mode of doing the work had been previously pointed out by the specification prepared by the corporation,—are we to say that there was any implied warranty to the effect that that mode of doing it was practically sufficient? If so, the plaintiff would be entitled to recover.

Now, certainly, when you have a formal document under seal without a warranty in express terms, we should not be likely to imply a warranty unless there is the clearest reason for it. Mr. Benjamin admits that he is unable to find any analogous cases in which a warranty has been implied under circumstances similar to these; and it seems to me that the burden is on the plaintiff to show that a warranty is fairly to be implied. I may say that, far from seeing any reasons, legally or morally just, from which we should imply it, it seems to me that the convenience and the right of things are all on the other side. As was well expressed by Mr. Baron Amphlett, on the occasion of the consideration of this case by the court below, the contractor might, if he doubted

whether the scheme was practicable, have asked the corporation for an express stipulation, or he might have declined to enter into the contract. He has done neither. He has chosen rather to act on Mr. Cubitt's reputation, or his own notions as to its being practicable, and has asked for nothing. It seems to me that if we were to introduce a warranty, we should be putting something into the contract which not only the parties did not put in it, but which they did not intend to put in it, and which, if it had been proposed to them, would probably have been refused; or, if they had agreed to any at all, it would have been a warranty considerably modifying any provisions as to how the work was to be carried out. Taking that view of it, I agree with what is the substance of the judgment below, that the plaintiff cannot recover on an implied warranty, there being no express warranty in the contract, and consequently the judgment of the court below must be affirmed.

*MELLOR, J.: I am of the same opinion, and con- [119
cur generally in the reasons given by my Brother Blackburn. I cannot think we are at liberty to infer from the circumstances of the case an implied warranty that the plans and specifications prepared by Mr. Cubitt on the part of the corporation were such as really could be executed. The contractors were at liberty, if they pleased, to employ their own engineer to see whether or not these plans were such as could be executed, and executed within the time limited. Both of the parties were, I think, on equal terms. I think it would be a dangerous thing if, under circumstances like these, where there are provisions with regard to delay on the one side, and there is no such provision on the other, we were to imply any such stipulation. Now the claim here is not for the extra expense to which the parties were put in executing the works; that has been settled. The claim is that they were so delayed in the execution of the works by reason of the failure of the plan, that their capital, machinery, &c., were kept idle. I can only say that if the contractor is to be entitled to have this made good by the corporation, he must give us stronger reasons than he has for implying a warranty.

LUSH, J.: I also concur in the opinion of my learned brothers, that the judgment of the court below ought to be affirmed; and I do so on the short ground that there is nothing in the contract which shows an intention on the part of the corporation to warrant the efficiency of the mode described of keeping out the water, and so enabling the contractors to go on with the work of building up the piers of the bridge. It is admitted that there is no express contract

1875

Thorn v. Mayor, &c., of London.

of the kind, and there is nothing whatever, in my opinion, to justify the court in implying any such contract; therefore, to impose such an obligation on the corporation would be to introduce a stipulation into the contract which the parties, either from design or inadvertence, it does not matter which, omitted; and we should, by so doing, introduce a new term, into the contract, which the court certainly is not competent to do.

BRETT, J.: I have come to the conclusion that the plaintiff cannot recover in this case, and that the judgment of the [120] court *below ought to be affirmed; but I differ from some of the steps by which the same conclusion has been arrived at by my learned brothers. Having no hope of altering their determination, I feel bound to state the grounds on which I think the judgment ought to be affirmed. I entirely agree that when a specification and plan are offered for tender by advertisement, they are at that time merely an offer, and there is no contract until the tender has been sent in and has been accepted; and if a contract or deed is then drawn up in writing, the specification and plan become no longer part of the contract; the only contract which can be considered by the court is the written contract, that is to say, in this case, the indenture. Then the question is, whether we can imply in this indenture a particular covenant. I think we have a right so far to consider the specification, plan, and tenders, as to take notice that the contract is made by means of such a process; and the question must be whether the proposed covenant can be implied in the indenture from the fact that the indenture was arrived at by means of the specification, plan, and tender. Now, this being so, I, although with great hesitation and deference, cannot come to the conclusion that in this case the substance or the subject-matter of the contract was merely the building of a bridge, and that the making of the caissons was a mere mode of dealing with the subject-matter of the contract, as if it were the scaffolding which is used for the purpose of building a house. If that were so I should not expect to find details of the mode in which the caisson was to be constructed. I do not recollect a contract, where the subject-matter being the building of a house, and where the scaffolding was to be erected for the purpose of building it, in which the exact method of making the scaffolding was in the specification; though it might be generally mentioned, still, if a mere mode of building the house, and the house were the subject-matter of the contract, I should say that the tenderor would leave a very considerable latitude as to the mode in which the contractor should deal

with the scaffolding; but here the very manner and method of making a caisson is one of the most particular parts of the contract. The caisson is an iron caisson, and as a matter of business and business knowledge, I should say that an iron caisson, built according to these specifications, was a wholly different thing *from that which is called a [121 coffer-dam, which, as I understand, is a thing made of timbers, and it is so wholly different, that it would be practically made and constructed by people of wholly different trades. Therefore, considering the mode in which the caisson is described in the specification, considering the practical difference between an iron caisson of this kind and a coffer-dam, although in some senses they are analogous and alike, and certainly are made for the purpose of performing the same ultimate function, I cannot think that the making of the caisson was a mere mode of building the bridge, for I think it was a substantial part of the contract, and one of the subject-matters of the contract. My view of the contract, therefore, is that it is to do successive things in a particular order, first, the making of the caisson, and after that the foundations of the bridge were to be built, and then the bridge was to be made and based on those foundations. Now there is nothing in the contract itself which would bind the plaintiff to make any part of the bridge before the caisson was completed, but practically I should say that the bridge must have been prepared. Considering the time in which the whole structure was to be finished, it would be absolutely necessary, I should think, on the plaintiff to have the bridge prepared and ready to be put up before the caissons were finished; at all events, it was right and reasonable that he should have them ready.

Now then comes the contract. I think the miscalculation was, in the first place, the miscalculation of the corporation. The engineer, Mr. Cubitt, was the engineer of the corporation, and I think the miscalculation was their miscalculation, and, therefore, the case must be considered precisely as if the contract had been made by Mr. Cubitt on his own behalf, and he had made the miscalculation. I think, further, that it was such a miscalculation as certainly prevented the plaintiff from earning the advantages which he was intended to have under and according to the contract. Certainly the miscalculation goes to that extent. I doubt very much whether it is not such a miscalculation as prevented the whole work being carried out at all under or according to the contract. I cannot, as at present advised, subscribe entirely to the view expressed by my Brother Blackburn,

1876

Thorn v. Mayor, &c., of London.

which is, that under the clause in the contract which enabled [122] the engineer to make *alterations, when those caissons failed in the mode in which they did fail, the engineer was able to substitute another method which would carry out the same result, and that the plaintiff was obliged to carry that out, for if that be the true view of the matter, it seems to me that the engineer might have directed that coffer-dams should be made, which, as I have already ventured to state, seems to me a radically different thing, and which requires a knowledge of a different kind of trade, and I cannot think that the plaintiff would have been bound, upon the order of the engineer, to abandon the making of the caissons in iron, and to adopt, upon the engineer's order, the making of the coffer-dams in timber. I am, therefore, inclined to think that the miscalculation of the corporation not only prevented the plaintiff from earning that which he was entitled to earn under the contract, but prevented the carrying out of the contract according to its terms, and the only way, therefore, if the plaintiff went on with the work, in which he could proceed must have been by a new contract, either expressed or implied. I must, therefore, deal with the case as if, upon discovery of the impracticability of the caissons, the plaintiff was not bound to proceed with the contract at all; and, therefore, the case comes to be the same to my mind, except for the purpose of the particular kind of damages claimed, as if the only subject-matter of the contract had been the caissons, and as if the miscalculation of the corporation had prevented the plaintiff from carrying out the contract or earning profit under it.

Now, upon this state of things, Mr. Benjamin argued that, by reason of the wording of this contract, there was an implied covenant as to the practicability of these caissons, relying upon the principle expressed in the proverbial phrase, "*Expressio unius est exclusio alterius*." Now, inasmuch as the express negatives of warranty on which he relied (') are negatives of perfectly independent covenants, I cannot think the negative of a warranty in these cases is such as enables us to apply the affirmative warranty which he desires to introduce into this contract. It seems, therefore, to me that the only way in which a contract could be implied is to say that in all works of this kind which are entered into by means of specifications and plans advertised, and [123] upon which *tenders are requested, there is an implied warranty on the part of those who issue the specification and tender that that which they desire to have done is

(') See clauses 36 and 54, Law Rep., 9 Ex., at p. 165.

a practicable thing; and nothing, it seems to me, can be more important than such a consideration. It is a vital consideration in a business of the largest kind. I cannot think that such a covenant can be implied under such circumstances. I have once before endeavored to express what I deemed to be the only principle of law on which courts can imply a contract between parties, and I endeavored to enunciate that in the case of *Daniels v. Harris* (*). What seems to me to be the principle is this. Whenever there is something not expressed which it is clear to all men of ordinary intelligence and knowledge of business must either have been latent in, or palpably present to, the minds of both parties when the contract was made—and unless you can say that the covenant which you desire to imply must have been so present to the minds of both, that if they had been called upon to express it anybody of ordinary intelligence or knowledge of business must have concluded that both would have expressed it in the desired form—I think the court has no right to imply such a contract. Therefore the question comes to be, whether we can say of this covenant that, if both parties had been called upon to express their meaning according to the view of every person of ordinary intelligence and knowledge of business, they would have come to the conclusion that such a covenant must exist. Upon this point I think the judgment of Baron Amphlett in the court below is most valuable. The question proposed is whether, in a specification, the person who is called upon to tender has a right to assume that the work is a practicable work, or whether he is bound himself to inquire.

Now it may be strongly argued that in one sense he is justified in relying on the practicability of the suggestion of the author. I cannot say that every person of ordinary intelligence and knowledge must come to the conclusion that the specification and plans are merely suggestions for an offer. But he who has to tender may offer or not at his pleasure. He certainly has to consider whether the proposition will be a profitable one to him. I think he must also go on, or it may be said he is called upon to go *on, and inquire whether that which is proposed [124 to him is practicable. If the proposition is that the thing shall be done in a particular time, it does not seem to me unreasonable to say that he must consider and calculate for himself whether the proposed work can be done within the time; and it is but a step further to say that he must consider also for himself and calculate whether the work can

(*) Law Rep., 10 C. P., 1, at p. 8.

be done at all, so as to enable him to earn the price he is to be paid. I think it may be said that both parties must make their own calculations; that if the contractor finds that the employer is proposing to him something which cannot be done, he ought not to offer to do the thing which in his mind cannot be done; and if he does not inquire into the matter or runs the risk, he must take the consequences, or if he thinks it doubtful he ought to correct the agreement by an express covenant. In the rule I have endeavored to enunciate, though I think the impossibility of carrying out the covenant was caused by the miscalculation of the defendants' proposition, still I think that the plaintiff, having accepted the contract and entered into it, if he required the stipulation on which he now relies, he ought to have had it expressed, and we are not at liberty to put it into the contract. It is on these grounds that I concur in the decision that the judgment of the court below should be affirmed.

GROVE, J.: I am of opinion that the judgment of the Court of Exchequer ought to be affirmed, and I give no opinion upon the question as to whether the caissons in a contract for building a bridge may be likened to a scaffolding as being the mode of performing the work, or whether they are themselves part of the work contracted for. It does not appear to me to be necessary to decide that point in this case; but in my opinion, there was no warranty expressed or implied in the contract or the specification that the work done according to the specification should be sufficient and practicable. There is certainly nothing expressed on the face of the deed, and what would be the warranty if the court were to imply a warranty from comparing all the various parts of these deeds? Very considerable variations are allowed by the deed, subject to the approval or under the direction of the engineer. To what amount of variation [25] would the warranty extend, or how far could certain variations be excluded from it, or, in other words, what departure ought to be permitted from the express terms of the specification? Without going minutely over the specification, there are things obviously of a substantial nature in which variations from the exact terms of the specification may be imported, and, therefore, if there be an implied warranty, it ought, in order fairly to guard the defendants in this case, to be such a warranty as would be capable of defining where it was to attach, and to what amount of variation it did not attach. I see nothing which would enable the court by comparing the terms of the deed to imply any

warranty sufficient to enable each party to know to what extent it went, or how far the plaintiff was protected on the one hand by it, or the defendants, on the other hand, pledged; so that it might be considered a reasonable and fair warranty between the parties. I think, also, there is enough in this contract, certain considerable variations being permitted, to call upon the plaintiff to say if he wished to be guarded against going beyond the specification, "I will not undertake this contract with a degree of variation of which I cannot very well see the amount, without having on the part of the defendants a proviso warranting me not merely as to the expense incurred (which is left in the specification entirely to the judgment of the engineer), but against what I may lose by the possible extension of time, as I am bound by the contract to three years." I see nothing which constitutes, on the part of the defendants, an implied undertaking that, if by any mistake in the specification or any variations beyond those given in the deed, the burden of the contract is increased beyond what was contemplated, the proviso as to three years is to be extended, the defendants paying any expense which may accrue from the extension. I do not see any warranty which by implication the court could attach to this deed which would fairly be binding and operative between the parties, doing no injustice to either.

Judgment affirmed.

Attorney for plaintiff: *J. B. Batten.*

Attorney for defendants: *F. Brand.*

[Law Reports, 10 Exchequer, 126.]

Feb. 12, 1875.

*MURPHY V. BOESE.

[126

Statute of Frauds—29 Car. 2, c. 3, s. 17—Sale of Goods—Memorandum signed by Agent—Evidence of Agency.

In an action to recover the price of clocks sold by the plaintiff to the defendant, it appeared that the plaintiff's traveller when he took the order for the goods wrote out in the presence of the defendant upon printed forms two memoranda of it, putting the defendant's name upon them, and handing one of the papers to the defendant, who kept it:

Held (distinguishing *Durrell v. Evans* (1 H. & C., 174; 31 L. J. (Ex.), 387)), that there was no evidence that the plaintiff's traveller signed the memoranda as agent of the defendant so as to bind him within s. 17 of the Statute of Frauds.

DECLARATION,—first count, for goods sold and delivered and money due on accounts stated; second count, for not accepting goods sold by the plaintiff to the defendant.

1875

Murphy v. Boese.

Pleas: First, never indebted; second, denial of agreement. Joinder of issue.

At the trial before Bramwell, B., at the Middlesex Sitings after Michaelmas Term, 1874, it appeared that the plaintiff was a merchant, carrying on business at Paris and Knightrider Street, City, under the name of Brown & Co. In July, 1874, the plaintiff's traveller, Dehorter, called on the defendant, and obtained from him an order for the supply of French clocks. Dehorter wrote the order in duplicate, upon printed headings, by means of the manifold writing process, handing the duplicate to the defendant, and keeping the original, which was on three sheets of paper. The following is the copy of the order:

"Ordered from Brown & Co.,

"68 Rue de Bondy, Paris,

"And 30 Knightrider Street.

"Date. 14th July, 1874.

"Name. Bernard Boese.

"Address. Kidderminster.

"Terms, 2½% discount for cash in 14 days from date of invoice, or net 3 mo. bill. Cases free. Goods carriage free to London.

[Here followed a specification of the articles and their prices.]

The words in italics were printed.

127] *A dispute as to whether the defendant should be responsible for breakage of the goods during the transit having arisen, the defendant refused to complete his contract. It was now objected on his behalf that there was no sufficient note or memorandum in writing to satisfy the 17th section of the Statute of Frauds. The learned Baron nonsuited the plaintiff, giving him leave to move to enter the verdict for £29 9s.

A rule having been obtained to enter a verdict for the plaintiff, on the ground that there was evidence for the jury, and that they ought to have found that the contract had been duly signed on behalf of the defendant, so as to satisfy the Statute of Frauds.

B. T. Williams showed cause: There is nothing in this case to show that the traveller Dehorter acted as the agent of both parties in writing down the terms of the order. The defendant's name was merely written by the traveller upon a paper with a printed heading, just as it is done in the case of an ordinary invoice. The defendant did nothing to recognize the name written on the paper as his signature. He merely received the paper, just as though it were a tradesman's bill.

Finlay, in support of the rule: There was evidence that the traveller signed the memorandum as the defendant's agent. It is now well settled that it does not matter whether the signature of the party to be charged is in the beginning or middle of the instrument: *Schneider v. Norris* ('); *Johnson v. Dodgson* ('). It is quite enough if the defendant's name is by his authority placed in some part of the contract. Here his name is written on the memorandum under his eye, and with his permission. There is no reason why the traveller should not prepare the contract as agent for both parties. It has been held that a note made by an auctioneer's clerk of the purchaser's name in a book is sufficient to bind him, in an action by the auctioneer: *Bird v. Boulter* ('). But the case is not really distinguishable from the recent decision in *Durrell v. Evans* ('). There the plaintiff's factor wrote down in the defendant's presence, on a printed form, the particulars of a quantity *of hops which the defend- [128] dant had agreed to purchase, putting the defendant's name at the top. The defendant looked at the paper, and requested that the date might be added, and the factor altered it. It was held by the Exchequer Chamber that there was evidence that the defendant's name was put on the paper by his authority. So here it is submitted that the fact that the defendant took and kept the paper, is abundant evidence of his consent that his name should be inserted in it.

BRAMWELL, B.: I think this rule should be discharged. It has been argued that the case cannot be distinguished from *Durrell v. Evans* ('), but think it may be said on the other side that it cannot be taken out of the express words of the Statute of Frauds. We are, no doubt, bound by the decision of the Exchequer Chamber in *Durrell v. Evans* ('), but this case is distinguishable from it, and when I remember that my Brother Crompton took part in that decision, I should wish to speak of it with the utmost respect. It was held in that case that the factor signed the paper on behalf of the buyer, and that this paper was intended to be a memorandum of the contract. I said in the court below, not that the memorandum was an invoice, but that I could not see how the factor was authorized to sign on behalf of the buyer, but the Exchequer Chamber thought that there was evidence that the defendant meant the paper to be a memorandum of the contract. What they had to consider was, whether the paper before them had the defendant's name written upon it by an agent on his behalf. And they

(') 2 M. & S., 286.

(*) 4 B. & Ad., 443.

(*) 2 M. & W., 353.

(*) 1 H. & C., 174; 31 L. J. (Ex.), 337.

thought that there was evidence that the factor was the agent of the buyer, because the buyer took a share in the preparation of the contract, and said, in effect, to the factor, "Write it down in such a way." If that decision is wrong, it is wrong in deciding that what the factor was asked to do made him the agent of the buyer, whereas it might be said that the buyer was only suggesting a correction to him, and treating him as the agent of the seller. Upon this subject I will say no more.

Now here, after the order had been given by the defendant, Dehorter makes two copies of the order, delivering one 129] to the *defendant and keeping the other himself. To my mind the question comes to this: did Dehorter act as the agent for both the plaintiff and the defendant? Now if anybody, not a lawyer, were asked whether Dehorter acted as agent for any one but his master, he would say, Certainly not; it is unreasonable to suppose such a thing. Now although we are told that a lawyer's view of what is reasonable is different from that of other people—still I think that the common understanding is a good test of the real meaning of the transaction. Now, is there any reason why we should disregard the understanding of reasonable persons for the sake of avoiding the operation of the statute? I can see none. I cannot see how this traveller is the authorized agent of the defendant. After he took the memorandum away, the defendant would be at liberty to say, "I am not going to be bound by it." If he was the defendant's agent, when did the agency commence? Was he agent at the time he wrote? This will scarcely be suggested. Did he become agent afterwards by ratification? If so, you would come to this difficulty, that when the agent wrote the paper he did not profess to act for the defendant. Try it another way. Suppose the thing was done in a hurry, and the defendant had said, "The contract to which you have put my name is inaccurately drawn up, and I will maintain an action against you for your blunder." Would not the agent have been surprised at this? If it be said that the same argument would show that *Durrell v. Evans* (') was wrongly decided, I say that I do not know that this would be the case, for there they held that the defendant had made himself a party to the terms of the contract by requesting that the paper should be altered. As for the argument that the defendant is bound because the paper was written in his presence, I can only say, suppose he had been blind, or that he could not read, or that the paper had been copied out a

(') 1 H. & C., 174; 31 L. J. (Ex.), 337.

week afterwards and then sent to him, could any agency have been inferred in such circumstances? These difficulties appear to me insurmountable. I think the rule ought to be discharged.

PIGOTT, B.: I am of the same opinion. *Durrell v. Evans* (*) differs in its facts from the present case in [130 a material particular. Here there was nothing done by the defendant to show that he constituted the traveller his agent. All that he did was to give an order, and when it was written out to take possession of it. Now is there in these facts evidence that he constituted the traveller his agent, to make a memorandum of the terms of the bargain? It is plain that there was no express authority, can any authority be implied from the facts? If it can, at what moment did the traveller become agent—after he had written the memorandum? or after the defendant had received the copy and kept it? Now, it seems to me, that none of the facts are different from what they would have been if the traveller had been only the plaintiff's agent. There is no circumstance inconsistent with his being merely the agent of the vendor. The buyer did nothing which is not done every day where the traveller acts for the vendor only. And it may be asked is the question to be raised in each of these cases, did the defendant see the traveller write out the order? did he approve of it? and are these questions to be left to the jury—we well know with what result. I think that these questions ought to be answered in the negative, and that this rule should be discharged.

POLLOCK, B.: I also agree that this rule should be discharged. I think that it is extremely important in all those cases in which it is attempted to prove an implied agency, or that there is evidence from which an agency may be inferred, to take into account the character of the parties and their usual course of dealing. The act requires that the note of the bargain should be signed by an agent of the party to be charged. At first sight it would seem odd that where two contracting parties meet together, that one who is in a position somewhat adverse to the other should be his representative and agent. But no doubt such a thing may happen, as in the instance which has very properly been cited of the auctioneer's clerk signing as agent of both parties. In Lord St. Leonards' work on Vendors and Purchasers, 14th ed., p. 147, he explains the principle upon which the auctioneer can bind both vendor and purchaser by his signature, citing *Earl of Glengal v. Barnard* (*), and *Em-* [131

(*) 1 H. & C., 174; 31 L. J. (Ex.), 337.

(*) 1 Keen, 769.

1875

Murphy v. Boese.

merson v. Heelis (*), and stating that the implied agency of an auctioneer is not extended to other cases. Therefore the present case is not within this exceptional rule. The case to which it has the nearest analogy is that of *Durrell v. Evans* (*), and it is remarkable that when that case came before the Court of Exchequer, Lord Penzance seems to have drawn the conclusion that what was done was nothing more than what occurs in making out and giving an invoice. I am bound to say that I agree with his reasoning, and I will apply it to the present case. I think *Durrell v. Evans* (*) can only be supported if it decides that the agency did not commence till after the memorandum was written out, and that will distinguish it from the facts before us. It might be said that the direction given by the defendant to Noakes the factor to alter the instrument, was an adoption of his act in preparing it, or a recognition *ab initio* of the whole document as containing the contract. Or one might go further and say that, from the nature of the transaction, and the meeting of the parties at the office, it might be thought that there was evidence that it was meant that Noakes should act as the scribe of both parties in drawing up a note of the contract. But here there is an entire absence of any act of recognition by the defendant of the traveller as his agent. The rule must be discharged.

Rule discharged.

Attorney for plaintiff: *W. R. Buchanan.*

Attorney for defendant: *F. Berkeley Calcott.*

(*) 2 Taunt., 38.

(*) 1 H. & C., 174; 31 L. J. (Ex.), 337.

One party cannot be the agent of the other for signing a memorandum of the contract: *Browne on Statute of Frauds*, §§ 366-8; *Strong v. Dodds*, 43 Vermont, 348.

Although the same person may act as agent of both parties: *Browne on Statute of Frauds*, § 369.

Nor is the contract good though the buyer give his note for the purchase price: *Combs v. Bateman*, 10 Barb., 573; *Ireland v. Johnson*, 28 How., 463; 18 Abb. Prac., 392; *Matice v. Allen*, 3 Abb. Court App. Dec., 248.

[Law Reports, 10 Exchequer, 132.]

Feb. 12, 1876.

*LOCKHART V. FALK.

[132]

Ship—Shipping—Charterparty—Demurrage—Clause exempting from liability.

By a charterparty made with the defendant, plaintiff's ship was to proceed to W., and there load a cargo "in the customary manner," and proceed to R. and deliver, "the cargo to be discharged in ten working days (weather permitting), commencing, &c. Demurrage at £2 per 100 tons reg. per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship." The customary rate of loading at W. was proved to be twenty tons a day:

Held, that the clause for lien and for exemption of the charterer applied only to demurrage at the port of discharge, not to damages for delay at the port of loading.

APPEAL from the Liverpool County Court.

The action was brought to recover damages for detention under a charterparty made on the 16th of March, 1874, between the master of the plaintiff's ship *Zoe*, of 138 tons measurement, and the defendant, by which the ship was to proceed to Weston Point, and there load a cargo of salt of 250 tons, "in the customary manner," and proceed with the same to Riga Bridge, and there deliver, "the cargo to be discharged in ten working days (weather permitting), commencing from the day after the ship has got into her proper discharging berth. Demurrage at £2 per 100 tons reg. per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship."

The vessel proceeded to Weston Point on the 20th of March, and notice was given on the 21st that she was ready to load. No cargo was loaded till the 11th of April, and the loading was not completed till the 20th, when bills of lading were signed (dated the 18th) to the order of defendant or his assigns, "he or they paying freight for the said goods and all other conditions, as per charterparty."

It was proved that the usual dispatch of the port was at least twenty tons per working day for loading; the plaintiff therefore contended that the loading should have been completed on the 4th of April, and claimed damages for [133] detention. The defendant, on the other hand, contended that the claim was one for demurrage, and that his liability had therefore ceased under the charterparty.

The learned judge held that the claim was not for demurrage, and gave judgment for the plaintiff for £44 2s. 8d.,

1875

Lockhart v. Falk.

being damages for detention at the rate of £2 15s. 2d. per day.

Jan. 20. *Gully*, for the defendant: The result of the cases is that, whenever a lien is given for demurrage, the clause absolving the charterer from liability applies: *Gray v. Carr* (¹), *Christoffersen v. Hansen* (²), *Francesco v. Massey* (³); and *Bannister v. Breslauer* (⁴), shows that effect will be given to such a stipulation by applying it wherever it appears to be the intention of the parties that the lien should exist, and although the charge may not be strictly demurrage. The lien here covers the delay in loading; the vessel was to load in the customary manner, and it was proved that by the custom of the port a definite time is given for loading. It can make no matter whether a fixed time is specified in the charterparty, or whether terms are used which, when construed by the facts, make the time certain; the result is that a time is fixed by the charterparty. The claim is, therefore, one for demurrage, at the stipulated rate of £2 per 100 tons, which is covered by the lien, and the charterer is released by the delivery on board of the cargo. [He also contended that the plaintiff was estopped by the date of the bill of lading from claiming damages for delay beyond the 18th of April.]

R. G. Williams, Q. C., for the plaintiff: No time is fixed by the charterparty for loading. The words "in the customary manner," do not refer to the time, but to the manner in which the loading is to take place: *Lawson v. Burness* (⁵), *Tapscott v. Balfour* (⁶). No time being fixed, the claim is not for demurrage, to which the stipulated rate of £2 per 100 tons and the stipulated time of ten days refers, but it is a claim for not loading in a reasonable time in respect of which no rate and no period is named. The [34] *clause, therefore, absolving the charterer from liability does not apply. *Prima facie*, such a clause relates only to future liabilities: *Pedersen v. Lotinga* (⁷), *Christoffersen v. Hansen* (⁸); not to such as have already accrued when the event releasing the charterer takes place. In *Oglesby v. Yglesias* (⁹), and *Milvain v. Perez* (¹⁰), the clause was extended to liabilities already accrued, because the express words of the provision required it; but this will not be done unless there are express words or a plain inference.

(¹) Law Rep., 6 Q. B., 522.

(²) Law Rep., 7 Q. B., 509.

(³) Law Rep., 8 Ex., 101.

(⁴) Law Rep., 2 C. P., 497.

(⁵) 1 H. & C., 396.

(⁶) Law Rep., 8 C. P., 46.

(⁷) 28 L. T., 267; 5 W. R., 290.

(⁸) E. B. & E., 930; 27 L. J. (Q.B.), 356.

(⁹) 3 E. & E., 495; 30 L. J. (Q.B.), 90.

In *Francesco v. Massey* (¹), it was held that the words used had that effect, but there a time was fixed both for loading and discharge, so that there was with respect to both a fixed time from which the ten days' demurrage could be reckoned; and, on the other hand, in *Bannister v. Breslau* (²), where the same was held, no time was fixed either for loading or discharge, nor was there any demurrage clause, so that if the clause had not been applied to damage for detention, there was nothing to which the word "demurrage" would have been applicable. *Bannister v. Breslau* (²) has, however, been doubted: see *Gray v. Carr* (³). In the present case there is a time fixed for discharge, but none for loading; the clause giving a lien and releasing the charterers from liability, is therefore to be limited to the liquidated claim, which might afterwards become due at the port of discharge, and ought not to be extended to the claim for unliquidated damages already accrued.

Gully, in reply.

Cur. adv. vult.

Feb. 12. The judgment of the court (Cleasby, Pollock and Amphlett, BB.) was delivered by

CLEASBY, B.: The question in this case is whether the charterer is liable for detention at the port of loading by not loading in the customary manner. There is also a question of amount depending upon the number of days during which the vessel was detained. We think the detention must be taken up to the time when the *cargo was [135 loaded, and that the date of the bill of lading is not conclusive.

There is a clause in the charterparty giving the shipowner a lien for freight and demurrage, and providing that the charterer's liability shall cease upon a cargo being put on board. The question really becomes, whether what may be called the "lien and exemption clause," which no doubt applies to demurrage properly so called, also applies, upon the language of this charter, to a claim for undue detention at the port of loading. A similar question has frequently arisen before, and we should not think of departing from what has been already decided; but it must always be borne in mind that if the language is not the same the decision may not be applicable. There is no case exactly the same as the present one.

The word "demurrage" no doubt properly signifies the

(¹) Law Rep., 8 Ex., 101.

(²) Law Rep., 2 C. P., 497.

(³) Law Rep., 6 Q. B., 522, at pp. 536, 546, 549.

1875

Lockhart v. Falk.

agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charterparty containing the clause in question we must collect what is the proper meaning to be assigned to it. When the charterparty contains no clause allowing demurrage at a specified rate at all, it has been held that the word "demurrage" in the exemption clause applies to detention, and that the charterer is discharged as soon as a cargo is on board. This was the case of *Bannister v. Breslauer* (¹). That decision is certainly not applicable to the present case, because we have in this charterparty a demurrage clause, though not a precise one. In the present case the charter provides that the ship shall be discharged in ten working days, and afterwards has these words, "Demurrage at £2 per 100 tons register per day."

It has also been decided that when there is a time specified for loading, and also a time for unloading fixed by its being at the rate of so many tons a day, and afterwards a demurrage clause for a fixed number of days at an agreed price per day, that in that case the exemption clause applies to demurrage, whether at the *port of loading or discharge; but it was thought clear it did not apply to detention beyond the lay days and demurrage days at the port of loading. This was the case of *Francesco v. Massey* (²). The effect of this decision is, that where there is a clause for demurrage at a specified rate for a certain number of days, and, a number of days being allowed for loading, there can be demurrage in the proper sense at the port of loading, the exemption clause applies to demurrage there.

And if we could read the provision for loading in the present case as fixing a particular time for doing so, the decision would apply at all events to the period, though not specified, to which the demurrage clause might be considered to apply. But we do not think we can read the words that the vessel shall load in the customary manner as equivalent to a provision that she shall load in a certain number of days, or at a certain rate per day, for the purpose of applying the word "demurrage" to a detention beyond that period. Those words do not admit, in our opinion, of an addition that she may remain, if she does not load in the customary manner, for a number of days on demurrage.

The conclusion at which we arrive is, that in the present

(¹) Law Rep., 2 C. P., 497.

(²) Law Rep., 8 Ex., 101.

case the word "demurrage" in the lien and exemption clause must be confined to demurrage days after the ten working days allowed for discharge, and not extended to improper detention at the port of loading.

The decision in the court below was therefore right, and the appeal must be dismissed.

Appeal dismissed.

Attorneys for plaintiff: *Prior, Bigg & Co., for J. B. Wilson, Liverpool.*

Attorney for defendant: *G. H. Field, for Thomas Ettty, Liverpool.*

[Law Reports, 10 Exchequer, 187.]

Jan. 28, 1875.

*SAINT V. PILLEY.

[137

Landlord and Tenant—Fixtures—Trustee in Liquidation.

A lessee of business premises having become insolvent, the trustee in liquidation put up the fixtures for sale by auction, under conditions which required them to be "cleared" by the purchaser in two days from the sale. The plaintiff bought the fixtures; but, with the knowledge of the trustee, allowed them to remain on the premises whilst he was treating with the landlord for a new lease. This negotiation fell through, and the trustee surrendered the premises to the landlord, who re-let them, the fixtures still remaining affixed. About a fortnight afterwards the plaintiff, learning of the surrender, applied to the landlord for the fixtures. In an interpleader issue between the plaintiff and a person claiming title through the new tenant:

Held, that the plaintiff had not lost his right by delay or laches, and that he was entitled to the fixtures.

INTERPLEADER. Issue tried before Mr. Watkin William, Q.C., sitting as commissioner at the Surrey Summer Assizes, 1874.

The facts were as follows: The property in question consisted of fixtures in a house in Fore Street, in the city of London, which had been held on lease by a firm of Huntley & Saint. The firm went into liquidation and the trustee put up the whole effects of the firm for sale by auction.

On the 25th of July, 1873, under conditions of sale, one of which was, "All the lots to be taken and cleared with all faults, at the purchaser's expense, within two days after the sale," the plaintiff, who was brother to one of the members of the firm, bought, amongst other things, the greater part of the fixtures: he paid for them on the 15th of August, but by arrangement with the trustee, he did not remove the fixtures, intending to take the premises and set up his brother in business there again. He negotiated with the

1875

Saint v. Pilley.

landlord for this purpose, but failed to come to terms with him, and in October the trustee sent the keys to the landlord, with a note giving up possession of the premises to him. About a fortnight afterwards the plaintiff, hearing what had been done, applied to the landlord for the fixtures which he had bought, and found that the premises had been let to a person, who afterwards let them to the defendant, [38] the fixtures being still *on the premises, which had till then remained closed. Ultimately an action was commenced by the plaintiff against one Lockyer, who had then come into possession of the premises and the fixtures under the defendant; and Lockyer having taken out an interpleader summons, the present issue was directed.

On these facts a verdict was entered for the plaintiff for the value of the fixtures, with leave to the defendant to move to enter the verdict for him, the court to have power to draw inferences. A rule having been obtained accordingly,

Gore and *Plumptre* showed cause, and contended that by the sale to the plaintiff the property in the fixtures had vested in him: *Hallen v. Runder* (1); that the act of the trustee was not a disclaimer under the Bankruptcy Act, 1861, s. 23, and that if it had been intended as such it could not have divested the right of the plaintiff; that it amounted, at the utmost, only to a surrender, which was completed by the acceptance of the landlord, and the new tenancy; that such a surrender could have no effect on rights already acquired for good consideration from the tenant; and that the right to remove as against the landlord was not lost, a reasonable time for removing not having, under the circumstances, elapsed since the termination of the tenancy and its communication to the plaintiff: *London and Westminster Loan and Discount Co. v. Drake* (2).

Philbrick, Q.C., and *W. A. Lewis*, in support of the rule, admitted that there was no disclaimer under the Bankruptcy Act, 1861, s. 23, and that what was done by the trustee could not therefore have the retrospective effect given to a disclaimer by that section: but contended that all that the plaintiff bought was the right to enter and remove the fixtures, which right ought, under the conditions of sale, to have been exercised within two days, but ought, at any rate, to have been exercised during the continuance of the term, or at least of the possession: *Leader v. Homebood* (3); and that *London and Westminster Loan and Discount*

(1) 1 C. M. & R., 266.

(2) 6 C. B. (N.S.), 798; 28 L. J. (C.P.), 297.

(3) 5 C. B. (N. S.), 546; 27 L. J. (C.P.), 316.

Co. v. Drake ⁽¹⁾ did not apply, because in that case there *was no such stipulation for the removal of the fix- [139 tures as in the present case.

They also contended that certain of the fixtures were not trade fixtures. [They also cited *Amos on Fixtures*, 2d ed., p. 239.]

CLEASBY, B.: On the evidence we must take it that all the articles were of such a nature as the tenant had a right to remove. The question is, how far that right has been lost by reason of the neglect of the plaintiff as against the landlord to remove them within a reasonable time. Now what took place was this: it was not intended to remove them at all; they were bought by the plaintiff in the hope that, as there was a bankruptcy, and as the trustee would not be likely to continue the business, there would be an opportunity of taking the premises and setting up the bankrupt in business there again. Negotiations for this purpose were carried on with the landlord for about two months; then, fourteen days after the surrender by the trustee, the goods were applied for and possession of them was refused, and subsequently a formal demand was made. It is sufficient to say that at the earlier period the plaintiff was in time, and that is enough to prevent the plaintiff from losing his right of removal.

The real question between the parties is the title to these articles; and it is quite plain that the surrender did not forfeit the right which the vendee of the property had acquired. The general maxim is laid down in *Co. Litt.* 338 b: "Having regard to the parties to the surrender, the estate is absolutely drowned. . . . But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance." Therefore, though the term was surrendered, yet the plaintiff's right was not affected; the defendant came into possession of the premises with chattels upon them, which were subject to the rights of a third person. The case of *London and Westminster Loan and Discount Co. v. Drake* ⁽¹⁾ is an authority which applies to the present case, and we could not decide on the *ground [140 taken by Mr. Philbrick without, in effect, overruling that decision. The rule must, therefore, be discharged.

POLLOCK, B.: I am of the same opinion. The first question is whether the goods were fixtures which the tenant was entitled to remove, which is a question partly of fact and

⁽¹⁾ 6 C. B. (N.S.), 798; 28 L. J. (C.P.), 297.

1875

Saint v. Pilley.

partly of law; we have power to draw inferences, and, looking at the character of these articles, I am of opinion that they were such. The second question is as to the effect of the note sent to the landlord by the trustee; and I have come to the conclusion that, though it was not a disclaimer, yet being consented to and acted upon, it was valid as evidence of a surrender by operation of law. Thirdly, assuming there was a surrender by operation of law, what were the rights of the plaintiff? Now the right of a tenant has long been considered as more than a bare right to remove. In *Poole's Case* (1) Lord Holt lays down that "this was not like tenant for years without impeachment of waste; in that case he allowed the sheriff could not cut down and sell, though the tenant might; and the reason is because in that case the tenant hath only a bare power without an interest; but here the underlessee hath an interest as well as a power, as tenant for years hath in standing corn, in which case the sheriff can cut down and sell." The tenant has, therefore, an interest in the fixtures which may well be the subject of an assignment. If so, then the passage from *Co. Litt.* 338 b, cited by Willes, J., in *London and Westminster Loan and Discount Company v. Drake* (2), applies, and is not only binding upon us, but is agreeable to the true notions of what is right and equitable. But Mr. Philbrick argued that the plaintiff had either abandoned this right or been deprived of it by laches. To determine this, we must look at the whole circumstances of the case; and I am of opinion that the plaintiff did all that a reasonable man could be expected to do.

AMPHLETT, B.: I am of the same opinion. The tenant was entitled during his tenancy to remove the fixtures. On his becoming bankrupt, the trustee might have disclaimed; he would then have had no further interest in the fixtures, [41] and by s. 23 *of the Bankruptcy Act, 1869, the disclaimer would have taken effect from the date of the order. But before anything like a disclaimer, he sold the fixtures; and if it were necessary to decide the point, I should be disposed to agree with the view taken in *Amos on Fixtures* (2d ed., p. 239), that after the sale of the fixtures he could not have disclaimed, because he would have dismantled the house. That question, however, does not arise, because it is admitted there was no disclaimer. But as to the fixtures, the plaintiff having bought and paid for them, the property in them vested in him, and he had the same right of removal which the tenant had had. Subsequently the trustee took

(1) 1 Salk., 368.

(2) 6 C. B. (N.S.), 798; 28 L. J. (C.P.), 297.

on himself to surrender the term to the landlord, and the question is whether this surrender, though good as regards the tenant, could prejudice a third person who had derived an interest for value from the tenant through the trustee. It is a well-known rule that a man cannot derogate from his own grant, and the surrender to the landlord must therefore be subject to the sale previously made to the plaintiff. I should without hesitation apply that rule if there were no decision to that effect; but we have an express authority in *London and Westminster Loan Discount Co. v. Drake* ⁽¹⁾.

But, again, it is said that the right of removal must be exercised within a reasonable time after the surrender, or rather, for this is the proper period to look to in this case, after notice of the surrender, and this was not done. I think, however, that the plaintiff did apply within a reasonable time, and that he is not therefore debarred from asserting his right to the fixtures.

Rule discharged.

Attorney for plaintiff: *J. M. Green.*

Attorneys for defendant: *A. J. Baylis & Son.*

(¹) 6 C. B. (N.S.), 798; 28 L. J. (C.P.), 297.

A tenant who allows his own fixtures, which he has a right to remove, to remain upon the demised premises until after the expiration of his lease, does not *ipso facto* forfeit his title thereto. Although he may be guilty of a trespass in entering to remove them, the owner of the realty cannot recover as damages the value of the fixtures or of any part thereof: *Holmes v. Tremper*, 20 Johns., 29; *Lawrence v. Kemp*, 1 Duer, 363; *Beardsley v. Sherman*, 1 Daly, 326; *Dubois v. Kelly*, 10 Barb., 496; *Hartwell v. Kelly*, 117 Mass., 235; *Cheatham v. Plinker*, 1 Tenn. Chy., 576; *Lawrence v. Woods*, 4 Bosw., 354. See however *Taylor's Landlord and Tenant*, §§ 551-3.

See *Kissam v. Barclay*, 17 Abbott's Prac., 360; *Ramsden v. Dyson*, L. R., 1 H. L., 129; *Denham v. Sankey*, 88 Iowa, 269.

Even though the tenant have taken a new lease after erection of the fixtures: *Devine v. Dougherty*, 27 How. Prac., 455; but see *Taylor's Landlord and Tenant*, § 552; *Elliott v. Johnston*, L. R., 2 Q. B., 120.

Unless it be apparent from the lease that fixtures to be annexed were intended thereby to become a part of the

realty: *Mayor, etc., v. Brooklyn, etc.*, 41 Barb., 231, affirmed 8 Abb. Court Appeals Dec., 251; *French v. Mayor, etc.*, 29 Barb., 363; *Taylor's Landlord and Tenant*, § 554.

See *Kissam v. Barclay*, 17 Abbott's Prac., 360; *Lawrence v. Woods*, 4 Bosw., 354; *Thrall v. Hill*, 110 Mass., 328.

Where the lessor is to pay for fixtures see *Lawrence v. Woods*, 4 Bosw., 354; *Ref. etc., v. Packhurst*, 4 Bosw., 491; 16 Abb. Prac., 205; *N. Y., etc., v. Saratoga, etc.*, 39 Barb., 289; *Elliott v. Johnston*, L. R., 2 Q. B., 120; *Baile v. Rodway*, 27 Wisc., 172; *Paine v. Rector*, 7 Hun., 89; *Smith v. Cooley*, 5 Daly, 401; *Nudell v. Williams*, 15 Upper Canada C. Pl., 348; *Brand v. Brumceller*, 32 Mich., 21.

In Pennsylvania it is held a tenant cannot remove his fixtures after the expiration of the term: *Davis v. Moss*, 38 Penn. St. R., 346; *White v. Arndt*, 1 Wharton, 94.

So in Massachusetts: *Biss v. Whitney*, 9 Allen, 114.

Even though the tenant surrender to his landlord after levy on the fixture on an execution against him: *Walter's appeal*, 70 Penn. St. Rep., 895.

1875

Mackenzie v. Whitworth.

But in that state fixtures remain the property of the tenant if so agreed between him and his landlord: *Spencer v. Darlington*, 74 Penn. State Rep., 286.

If the tenant retain possession of the premises after his term expires, he is not even a trespasser for removing such fixtures: *Dubois v. Kelly*, 10 Barb., 496; *Taylor's Landlord and Tenant*, § 551.

Where land is let to tenants for the purpose of nurturing trees and plants, they are personal property: *King v. Witcomb*, 7 Barb., 263; *Taylor's Landlord and Tenant*, § 552.

Should the tenant allow such fixtures to remain upon the premises without asserting or claiming title thereto an unreasonable time after surrender of possession of the demised premises, the presumption that he has abandoned such fixtures may obtain: *Dubois v. Kelly*, 10 Barb., 496; *Burk v. Hollis*, 98 Mass., 55; *Taylor's Landlord and Tenant*, §§ 551-3.

See *Noble v. Sylvester*, 42 Vt., 146.

No presumption of abandonment obtains from non-removal during the term where the same is uncertain in its continuance and may be terminated suddenly, and without previous notice: *Northern, etc., v. Canton, etc.*, 30 Maryland, 347, 8 Am. Law Reg., N. S., 540 and note p. 544; *Hartwell v. Kelly*, 117 Mass., 235; *Cheatham v. Plinker*, 1 Tenn. Chy., 576; *Mann v. Hughes*, 10 Law Reporter, N. S., 628.

A conveyance by the landlord will not transfer title to such fixtures to the grantee, though if owned by the grantor they would have passed: *Raymond v. White*, 7 Cow., 319; *Miller v. Plumb*, 6 Cowen, 665.

A tenant may remove his fixtures at any time during the term, although the lease contain a provision that he may remove them at the expiration thereof: *Alexander v. Touhy*, 13 Kansas, 64.

It has been held that if the landlord refuse after expiration of the term to deliver a fixture to his tenant or an assignee, neither replevin nor trespass will lie therefor: *Brown v. Wallis*, 115 Mass., 156; *Guthrie v. Jones*, 108 Mass., 194; *Stockwell v. Marks*, 17 Me., 455; *Cresson v. Stout*, 17 Johns., 116; *Minsall v. Lloyd*, 2 Mees. & Welsb., 450.

See *Niblet v. Smith*, 4 Term. Rep., 504; *Hannahan v. O'Reilly*, 102 Mass., 201.

Although an action of tort will lie if the landlord, during the term, forcibly prevent a removal by the tenant: *Guthrie v. Jones*, 108 Mass., 191.

A complaint by an administratrix, charging an injury to the personal chattels of the deceased, is sustained by proof of injuries to building, held by him as tenant from year to year, in the matter of a trade fixture and removable as between landlord and tenant: *Barnet v. Lucas*, Irish Rep., 6 Com. L., 247, reversing 5 Com. L., 140.

[Law Reports, 10 Exchequer, 142.]

Feb. 10, 1875.

142]

*MACKENZIE V. WHITWORTH.

Marine Insurance—Reinsurance—Policy—Interest.

An underwriter "on goods" may reinsure by the same description; and the policy need not be expressed to be a reinsurance.

THIS was an action on a policy, dated the 24th of April, 1873, and effected with the defendant by the plaintiff through his agents, as well in their own names as for and in the name and names of all and every other person to whom the same did appertain, "at and from New Orleans to Revel upon goods, beginning the adventure upon the said goods

from the loading thereof on board the ship Southampton at as above," the policy being a valued one for £5,000.

The declaration, after stating the policy, averred that The United States Lloyd's and Individual Underwriters of New York were interested in the said goods, and that the policy sued upon was made for the use and benefit and on account of the persons so interested.

The defendant pleaded, amongst other pleas, 4, denial of the interest alleged; 8, concealment that the interest was that of insurers.

At the trial of the cause before Pollock, B., at the Liverpool Summer Assizes, 1874, it appeared that The United States Lloyd's and Individual Underwriters of New York had underwritten a policy on the goods mentioned, being cotton to be shipped by Messrs. Putnam & Co., of New Orleans, to the amount of £80,000, and that the policy in question was effected for them to cover a portion of their risk, of which they still held £20,000.

Evidence was given on the part of the defendant, which was not contradicted, and it was in fact admitted on the part of the plaintiff that in all cases of reinsurance policies the invariable practice had been to disclose the fact that the policy was for reinsurance; and it was proved that the plaintiff, at the time of the insurance, knew that such was the nature of the policy in question, but that this fact was not communicated to the defendant.

Evidence was also given, both on the part of the plaintiff and *the defendant, as to whether this was a fact material to the risk or material to be communicated to the defendant; and in particular the defendant gave evidence that he would not have underwritten the policy if he had known that it was a reinsurance, and that it was the practice of many underwriters to refuse reinsurances.

Cotton to the value insured by The United States Lloyd's and Individual Underwriters of New York was shipped at New Orleans; the ship sailed on the 28th of February, 1873, and was, with the cargo, destroyed by fire on the 19th of March.

The learned judge ruled that the interest of The United States Lloyd's and Individual Underwriters of New York was sufficiently described in the policy, and left to the jury the question of concealment. The jury found for the plaintiff on all the issues of fact, and a verdict was thereupon entered for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him.

A rule having been obtained accordingly, on the ground

1875

Mackenzie v. Whitworth.

that the plaintiff, being only interested as an insurer, was not entitled to recover on the policy sued on,

Benjamin, Q.C., and *Myburgh*, showed cause: The objection that the policy was not stated to be a reinsurance cannot be rested on the ground that a material circumstance was not disclosed, because the jury have found for the plaintiff upon the plea of concealment. The objection, therefore, must be that as a matter of law a policy of reinsurance must be so described, or that the interest of the assured must be described as an interest in reinsurance. But the true rule of insurance law is that the subject-matter of insurance only need be described; in general, the interest of the assured in that subject-matter need not: Arnould on Mar. Ins., 4th ed., vol. i., p. 21; Phillips on Ins., art. 415. Thus it is the constant practice for carriers, bailees, and mortgagees, to insure without describing their interest, and to recover according to the extent of their interest. The general rule is so laid down expressly in *Crowley v. Cohen* ⁽¹⁾ in the case of carriers, [144] and in substance *that case is identical with the present, because the interest of carriers is only their liability over as insurers of the goods they carry. The case of warehousemen is similar; their interest is their liability to those who have entrusted goods to them. If, therefore, an insurer effecting a reinsurance is bound to describe the nature of his interest, it is, with one exception, the only case in which a statement of the nature of the interest is required. That exception is in the case of bottomry and *respondentia*, which is always treated as an exceptional instance, and is expressly stated to be such by Lord Mansfield, C.J., in the case in which the point was established: *Glover v. Black* ⁽²⁾. That case was decided entirely on a usage and practice said to prevail among merchants that bottomry and *respondentia* must be insured *eo nomine*; and that the decision was founded on this, and not on general principles, is shown by the subsequent case of *Reed v. Cole* ⁽³⁾, where the policy was in substance nothing else but a reinsurance. Further, the custom proved or admitted in the present case is entirely accounted for by the statutory rule which prevailed till very recently. By 19 Geo. 2, c. 37, s. 4, all reinsurance was prohibited, except in certain cases, and in those cases it was allowed only "provided it be expressed in the policy to be a reinsurance." The prohibition was removed by 27 & 28 Vict. c. 56, s. 1; but the proviso remained in force until 30 & 31 Vict. c. 23, sched. D, repealed the whole section,

⁽¹⁾ 3 B. & Ad., 478, at p. 485, per Lord Tenterden, C.J.

⁽²⁾ 3 Burr., 1394.

⁽³⁾ 3 Burr., 1512.

which was also included in the schedule to 30 & 31 Vict. c. 59 (the Statute Law Revision Act, 1867). Therefore, until 1867, the statement in the policy that it was a reinsurance was required by statute (which of itself tends to show that it was otherwise unnecessary), and no inference can be drawn from the usage of mentioning it during that time, or from the survival of that usage since. This case, therefore, falls within the general rule, and not within any exception to it; and this is the opinion of Phillips on Ins., art. 498, referring to *New York Bowers Fire Insurance Co. v. New York Fire Insurance Co.* ('). [He also referred to *Anderson v. Morice* (').]

**Herschell*, Q.C., and *Baylis*, in support of the [145 rule: The subject-matter of the policy is not properly described. The case of bailees, carriers, and others having a possessory interest in the goods is not in point. Having a real interest in the goods themselves, an insurance effected by them may be properly described as an insurance on goods, and the additional interest which they have in respect of their liability over does not make that description incorrect: *London and North Western Ry. Co. v. Glyn* ('). The same is true with respect to mortgagor and mortgagee; the one is the owner of the ship, the other is an incumbrancer upon it with a power of sale, and clearly has an interest in it. But an insurer has no interest in the goods themselves; his interest is only in a contract by which, in consideration of premiums, he undertakes to indemnify against their loss or damage. He may be said to have an interest in the event of the safe arrival of the goods, but not in the goods themselves. In countries where reinsurance has been constantly allowed, it is in general not only customary, but necessary by law to describe the policy as one of reinsurance: see Arnould, Mar. Ins., 2d ed., vol. i., p. 340, n. (2). The case cited by Phillips of *New York Bowers Fire Insurance Co. v. New York Fire Insurance Co.* (') does not bear out the proposition for which he quotes it; it is true that the policy was on goods, but it was stated on the face of it to be a reinsurance. Moreover, in that case the policy was successfully attacked on the ground of the non-communication of facts relating to the original assured; the chief importance therefore of the case is that it shows the propriety of informing the underwriter that it is a reinsurance. And, though Phillips inclines to the opposite view, he cites Christian as an authority that "a reinsurance must be expressly mentioned

(') 17 Wend., 359.

(*) 1 E. & E., 652; 28 L. J. (Q.B.), 188.

(') Law Rep., 10 C. P., 58.

1875

Mackenzie v. Whitworth.

to be a reinsurance in the policy." But even assuming that the interest of an insurer could independently of custom be properly described as an interest in goods, the general usage and custom among underwriters would make the description improper. The reason of the decision in *Glover v. Black* (1) applies to the present case. If, on the ground that it was [46] the usage to insure *bottomry and *respondentia eo nomine*, it was held that a policy on *respondentia* describing it merely as "goods" was bad, the same result will follow with respect to reinsurance. A contract is to be interpreted according to the intention of the parties as expressed in the ordinary terms of mercantile dealing; and if by mercantile custom and usage a contract of reinsurance is not described merely as an insurance on goods, the underwriter cannot be bound by a contract of reinsurance so expressed; he never intended to be so bound, and the contract is not one which, interpreted according to usage, so binds him. It can make no matter how the custom originated, if it exists, and the fact that till lately it was necessary by statute to state the policy to be a reinsurance only shows the universality of the custom, and makes it the more certain that the mercantile interpretation of an ordinary insurance on goods excludes reinsurances. The express mention of reinsurance in 30 Vict. c. 23, s. 4, also shows the common understanding. The description in this policy is therefore neither in itself a proper one, nor, if otherwise proper, is it one which, as interpreted by the custom prevailing among underwriters, properly expresses the intention of the defendant to become a party to a policy of reinsurance.

BRAMWELL, B.: I am of opinion that this rule must be discharged. It is admitted that, as a general rule, a policy of marine insurance must contain a description of the ship, the subject-matter of the insurance, the voyage, and the perils insured against, and the assured, if challenged, must show the extent of his interest. A policy of marine insurance is said to be an instrument which has a meaning by custom, and if you were to prepare a new form you would say that, in consideration of such and such a premium, the underwriter undertakes to indemnify the assured against the risk of a certain loss occasioning damage to him. That means that you must state the ship, the subject-matter of insurance, the risk or voyage, and the perils insured against. Now here that has been done, because the plaintiff says, "What I want to be insured against, is the non-arrival of the goods described." Therefore, it is rather for the defen-

(1) 3 Burr., 1394.

dant to make out that there is *some cause why an [147 exception to the general rule should be introduced in his favor, than for the plaintiff to make out that he has done all that can be required of him. The defendant seeks to make this out on a ground which, if good at all, goes rather to the question of concealment than to anything else. He says, "It is true you are interested in the arrival of the goods, and will be damaged by their non-arrival, or arrival in a damaged condition; but you have concealed from me that you were not what those who insure generally are, that is, an owner, but were only an insurer." Now, if that is a good reason for the underwriter to advance, then the jury should have found for the defendant, on the ground of concealment; and it may be that there is good reason why they should find that it is material to the underwriter that he should know that the policy is a reinsurance. But there is no rule on the ground that the verdict is against the weight of evidence. If, however, it is immaterial, then I cannot very well see why it should be stated in any shape, and I should not be very ready to introduce another anomaly into the law relating to the preparation of policies of insurance in favor of something that is immaterial, especially since the underwriter may put in any clause that he thinks necessary for his protection, and might, if he thought fit, have inserted the words "warranted not a reinsurance." The case therefore stands thus: if it is material, the jury should have found against the plaintiff on the issue of concealment; if it is immaterial, it is not for us to introduce an anomaly into the general law when the underwriter may guard himself by express words.

The authorities, it seems to me, are strong in the plaintiff's favor. There is the case of the carrier who is at liberty to insure goods in the same way that an owner would, without stating that his interest is his liability over to the owner. I have not forgotten the ingenious argument of Mr. Herschell with respect to the possessory interest of a bailee of goods; but the answer is, that if he insured nothing but his possessory interest he could only recover a nominal amount; that he may and does recover substantial damages shows that he is insuring in respect of his liability to the owner. So, in the case of the mortgagor *and mort- [148 gagee of a ship; they can both insure, and can recover in respect of their respective general interests in the ship. The rule, indeed, is that you must specify the subject-matter of insurance, not your interest in it, and this is so laid down in

the passages in Arnould and Phillips cited by Mr. Benjamin.

The only case relied on for the contrary proposition is one which we must treat with great respect, but I must confess I do not understand the principle of the decision. It is the case of *Glover v. Black* ⁽¹⁾, where it was held that in an insurance of *respondentia* it must be so described. It was so held under peculiar circumstances, and apparently in consequence of an understanding said to prevail among merchants, that where *respondentia* was insured, it was insured *eo nomine*, and was not described as an insurance on goods. If so, I should have thought it was a matter that went to concealment, for I do not see how the practice of merchants could make the statement in the policy erroneous. However, if the question here arose on an insurance of *respondentia*, we would follow that case, and leave the plaintiff to error. But it is not such; and Lord Mansfield expressly says, in *Glover v. Black* ⁽¹⁾, that the decision is not to be taken as laying down a general rule. If so, the case is one decided on the ground of convenience and with reference to the particular mercantile understanding referred to, and does not govern that now before us; and it is no authority in favor of introducing a second anomaly into the law of insurance. Therefore the rule must be discharged.

POLLOCK, B.: I am of the same opinion. The finding of the jury was that there was no concealment in not stating that the policy was a reinsurance. This observation is of considerable weight, because it excludes any argument tending to show that there was any substantial increase over the contemplated risk, or any difference in the premium, in consequence of the fact being withheld.

The question of law, therefore, which we have to decide is, whether by any known practice, or by any rule of law, the person effecting a policy of reinsurance, is bound to [49] state that it is a *reinsurance. It is not contended, nor could it be, that he is bound to state the risk to be on reinsurance, but it is said that he ought to state the policy to be a second insurance, and that otherwise he cannot recover upon it. Is there, then, any authority for this proposition? I can find none. Reinsurance has been known almost as long as insurance, and (except during a certain period in our own country) it has been practised all over the world. The general rule is that it is the duty of the assured to state the subject-matter of insurance, and then, before he can avail himself of the fruits of his policy, he must go

(1) 3 Burr., 1394.

further, and show the extent of his interest. Emerigon, ch. 8, s. 14, cites the Ordonnance in these terms: "It shall be allowable to insurers to reinsure with others the *effects* they have insured" (1); and Pothier, *Traité d'Ass.* art. 35, says: "C'est par le même principe qu'on ne peut faire assurer que ce qu'on risque de perdre, qu'un assureur peut bien faire réassurer les *effets* qu'il a assurés, parce que la perte que en peut arriver, est pour lui une perte qu'il court risque de faire." This takes for granted that the reinsurance is an insurance on the "effects," although the interest of the assured is different. In English law there are abundant illustrations of this rule. The carrier who has only a partial interest in the goods, the vendor who may have parted with his property in the goods, the bailee who never had any property in them, the mortgagor and mortgagee of the ship, may insure and may recover according to their respective interests. In *Reed v. Cole* (2), where a member of a mutual assurance society had parted with his vessel before the loss, he was held entitled to recover on [150 the articles of agreement, because he was still a member, and "continued contributory to the losses of the others," and "still had an interest in the safety of the ship," because he had agreed with the purchaser to pay £500 if a loss happened within three months. "He had not parted with all his interest in it, but continued interested *quoad* this loss." In that case he was no more an owner of the vessel than any other person in the world; but he had undertaken a liability contingent on the safety of the ship, and was therefore held entitled to recover. This was decided shortly after *Glover v. Black* (3), and is an authority to show that that decision was not intended to impair the general rule that it is sufficient to set forth the subject-matter of insurance.

In *Glover Black* (3) it was no doubt held that one who had advanced money on *respondentia* could not insure it without stating the insurance to be on *respondentia*. We must

(1) In chap. 10, s. 11, Emerigon says: "The Ordonnance requires a special stipulation on the subject of the tenth whenever this is intended to be insured (Ord. 18, 19). It is the same with freight earned, which the Declaration of 1779 allows to be insured. So also with the sum which one causes to be reinsured." The text of the Ordonnance is as follows: Liv. 2, tit. 6, art. 18: "Les assurés courront toujours risque du dixième des effets qu'ils auront chargés, s'il n'y a déclaration expresse dans la police qu'ils entendent faire assurer le total. 19. Et si les as-

surés sont dans le vaisseau, ou qu'ils en soient les propriétaires, ils ne laisseront pas de courir risque du dixième, encore qu'ils aient déclaré faire assurer le total. 20. Il sera loisible aux assureurs de faire réassurer par d'autres les effets qu'ils auront assurés, de faire assurer le coût, de l'assurance et la solvabilité des assureurs;" nothing being said in the Ordonnance as to a declaration in the case of reinsurance.

(2) 3 Burr., 1512.

(3) 3 Burr., 1394.

pay all respect to that decision, but it is to be observed that for some time previously there had been a great jealousy as to money borrowed on ships and cargoes, both with respect to those who borrowed and those who lent. Merchants were often mere adventurers who, having paid nothing for the goods shipped, immediately insured them, and those who had advanced the money insured their advance at maritime interest. Wager policies and gambling insurances were of frequent occurrence. This is a practice which all writers on insurance law have set themselves against, as may be seen in Emerigon⁽¹⁾ and Pothier⁽²⁾, and art. 347 of the Code de Commerce⁽³⁾.

It was in that state of circumstances that the case came before the court, and it was no doubt treated by the court as a fact that there was a general usage and understanding of merchants that an insurance of *respondentia* or bottomry should be so described. Lord Mansfield was at first very much inclined to support the policy; and in deciding [51] against it he said, "It is established now, *on the law and practice of merchants, that *respondentia* and bottomry must be mentioned and specified in the policy of insurance," but he added, "they did not mean to determine that no special interest in goods may be given in evidence in other cases than those of *respondentia* and bottomry, if the circumstances of the case shall admit of it." It is remarkable that in the same court, about twenty years afterwards, in the case of *Gregory v. Christie*⁽⁴⁾, cited in Park on Ins., 8th ed., pp. 11, 104, it was held that where a policy contained the words "goods, specie, and effects," the assured was entitled, on the ground of "express usage," to recover a sum of money advanced by the master for the benefit of the ship, and for which he charged a *respondentia* interest; and Buller, J., cites *Glover v. Black*⁽⁵⁾ as an authority for the decision. The meaning, therefore, of *Glover v. Black*⁽⁵⁾ is, that it was the practical interpretation of policies of insurance in trade that in a policy the words "goods and merchandises" did not describe *respondentia*. Therefore *respondentia* and bottomry rested on some peculiar grounds. The case of reinsurance rests on none, unless we remove away from merely legal grounds to grounds of fact, and consider whether it is material to the underwriter that he should know it to be a reinsurance, and then, *cadit questio*, because the jury have found it to be immaterial.

(1) Emerigon, ch. 8, s. 11.

(2) Poth. Tr. de l'Ass., art. 81.

(3) Code de Com., art. 347: "Le contrat d'assurance est nul s'il a pour objet

... les profits maritimes des sommes prêtées à la grosse."

(4) 3 Doug., 419.

(5) 3 Burr., 1394.

AMPHLETT, B.: I was for some time doubtful, but I am now satisfied that my doubts were not well grounded. My doubt was whether the subject-matter of insurance was sufficiently described in the policy; for no doubt to common apprehension there is a great difference between an insurance on goods and an insurance on the risk which the assured is to incur as insurer of these goods, and cases might be put where a very different defence might arise on the two policies. But I have come to the conclusion that the fact of the policy being a reinsurance is only a limitation on the liability of the second insurer, and does not make his risk cease to be a risk on goods.

Then the question arises, whether the existence of a custom that it should be mentioned would affect the policy? And I agree *there is a very great deal in favor of the [152 view that this may affect the question, not whether as a matter of law the policy is void, but whether the policy is void by reason of concealment of a material fact. It is impossible not to see that, even though the risk were the same, it would be convenient for the underwriter to know that the risk he was insuring was only the risk of the first insurer; and there is no doubt a notion prevailing that it is right and proper that the fact of the first insurance should be mentioned. And that it is right and proper derives support from the proviso in 19 Geo. 2, c. 37, s. 4. There appears also to be reason to say that this practice prevails very generally throughout the world. But although no doubt there is a notion widely prevailing that it is right and proper the fact should be mentioned, and we have what is equivalent to a finding, namely, an admission by Mr. Benjamin at the trial, that it is a very general usage and practice to mention it; yet, as the jury have found that there was no undue concealment, and as there is no rule questioning the verdict on that point, we must assume that the finding is right. The rule must therefore be discharged.

Rule discharged.

Attorneys for plaintiff: *Norris, Allen & Co., for Simpson & North, Liverpool.*

Attorneys for defendant: *Gregory & Co., for Hull, Stone and Fletcher, Liverpool.*

[Law Reports, 10 Exchequer, 153.]

Feb. 11, 1875.

[IN THE EXCHEQUER CHAMBER.]

153]

*CURRIE and Others v. MISA.

Pre-existing Debt—Check given on Account of—Negotiable Security payable on Demand.

The title of a creditor to a negotiable security given to him on account of a pre-existing debt, and received by him *bona fide* and without notice of any infirmity of title on the part of the debtor, is indefeasible, whether that security be payable at a future time or on demand.

Judgment of the court below affirmed (Lord Coleridge, C.J., dissenting).

APPEAL by the defendant against the decision of the Court of Exchequer, refusing to grant a rule *nisi* to set aside the verdict entered for the plaintiffs, and to enter a verdict for the defendant, or a nonsuit.

The action was brought to recover £1,999 3s. upon a check of the defendant and interest thereon.

The declaration stated that the defendant, on the 14th of February, 1873, by his check or order for the payment of money directed to Messrs. Barnetts, Hoares, Hanburys & Lloyd, bankers, required them to pay to F. de Lizardi & Co., or bearer, £1,999 3s., and that the plaintiffs became the bearers of the said check, and the same was duly presented for payment and was dishonored, whereof the defendant had due notice, but did not pay the same.

Pleas: 1. Denial that the plaintiffs became the bearers of the said checks as alleged.

3. That there never was any consideration for the making or payment of the check by the defendant, and that F. de Lizardi & Co. delivered the check to the plaintiffs to hold the same as the agents of and on account of F. de Lizardi & Co., and not as bearers or transferees thereof. And that the plaintiffs presented the check for payment to the defendant as such agents for and on account of F. de Lizardi & Co., and not as the bearers or transferees thereof. And that when the check was presented for payment to the defendant, and dishonored by him, the plaintiffs had notice that there never was any consideration for the making or payment of the check by the defendant.

154] *4. That the defendant was induced to draw the check and to deliver the same to F. de Lizardi & Co. by the fraud of F. de Lizardi & Co., and that the plaintiffs were and are the bearers of the check, and have always held the same without giving any consideration for the same.

5. That there never was any consideration for the defendant's making or paying the check, and that the plaintiffs became and are the bearers of the check, and have always held the same without having given any consideration for the same.

Issue : and demurrer to third plea and joinder.

The cause was tried at the London Sittings at Guildhall, after Michaelmas Term, 1873, before Kelly, C.B., when the following facts were proved :

The plaintiffs are bankers, carrying on business in Lombard Street, London, under the firm of "Glynn, Mills, Currie & Co." The defendant is a wholesale wine merchant, carrying on business in London and at Xerez, near Cadiz, in Spain. Joseph Javier de Lizardi was a general merchant, who was a partner of or traded under the firm of "F. de Lizardi & Co.," which was established in London, and carried on a very extensive business with East Spain and the Continent generally, and dealt largely in bills upon foreign countries. In the month of February, 1873, the plaintiffs were, and for more than thirty years previously had been, the bankers of F. de Lizardi & Co., whose credit was extremely high. They had two accounts with the plaintiffs, namely, a loan account and a drawing account, and down to the month of December in that year usually had a considerable balance in the plaintiffs' hands. Early in 1873 Lizardi began to get into difficulties, and on the 3d of February in that year he overdrew his drawing account with the plaintiffs, being then, and having for some time previously been, also indebted to them on his loan account. From the 3d of February down to the 12th, 1873, he obtained large additional advances from the plaintiffs upon securities of various kinds deposited with them, and on the 12th of February, at the close of the day, Lizardi was indebted to the plaintiffs in the sum of £83,436 13s. 8d., of which £49,000 was due on the loan account and £34,436 13s. 8d. upon the drawing account.

Early in February, 1873, the defendant was at Xerez, near Cadiz, in Spain, and on the 11th of February, being [155 desirous of having a remittance of about £2,000 made from London to Cadiz, he on that day, by telegraph, instructed Mr. Pritchett, who had the general management of the defendant's business in London during his absence, to purchase from Lazard drafts on Cadiz to about the sterling value of £2,000. Accordingly on the same day, Tuesday, the 11th of February, Mr. Pritchett instructed Mr. Goodban, the defendant's bill broker, to apply to Lizardi for drafts on Cadiz to

1875

Currie v. Misa.

the amount of about £2,000. Mr. Goodban thereupon, on the same Tuesday, effected a contract between Lizardi and the defendant for the sale or delivery by Lizardi to the defendant of drafts to the amount of about £2,000 sterling, at an agreed rate of exchange, from London to Cadiz, to be at 15 days' date, and delivered the usual contract notes to the respective parties.

In the afternoon of the same day, the 11th of February, in pursuance of the above-mentioned contract, a clerk in the employment of Lizardi left at the defendant's office in London four drafts dated on that day, drawn by Francisco Lizardi in the name of F. de Lizardi & Co. upon Mr. Manuel Paul, Cadiz, for an amount in Spanish money equivalent at the aforesaid rate of exchange to £1,999 3s. These drafts were forwarded by the evening post of the same day to the defendant, at Xerez, near Cadiz.

It is customary in London to pay for drafts and bills on foreign countries, purchased or obtained through a bill broker, on the post day next after the day of the contract. There are two post days, namely, Tuesday and Friday, in each week; consequently, according to the usual course of business, the purchase or consideration money for the four drafts so contracted for on Tuesday, the 11th, was payable on Friday, the 14th of February.

After banking hours on the 12th of February, the plaintiff, Bertram Wodehouse Currie, who for many days previously had been urgently pressing Lizardi to reduce the amount of his indebtedness to the plaintiffs, and who on that day for the first time suspected (as the fact was) that some of the securities deposited with the plaintiffs were not genuine, had an interview with Lizardi, and represented to him that he had a suspicion that some of the securities were not genuine, and again pressed Lizardi to reduce his balance. Lizardi [156] assured Bertram Wodehouse Currie that he *was mistaken in his suspicions, and handed him a list of the securities, detailing their values, and showing a large margin over the plaintiffs' advances. Bertram Wodehouse Currie still pressed Lizardi to reduce his debt.

In the course of Thursday, the 13th of February, Lizardi paid into the plaintiffs' bank, to the credit of his drawing account, the sum of £6,925 5s. 8d., in two checks for £425 5s. 8d., and £6,500; and about two o'clock on that day he handed to Currie, in the plaintiffs' bank parlor, in Lombard Street, the following document, partly written and partly printed, impressed with a penny stamp:

“London, 14th February, 1873.

“M. Misa, Esq., 41 Crutched Friars.

“Please to pay to Messrs. Glynn, Mills & Co., or bearer, the sum of nineteen hundred and ninety-nine pounds, three shillings, for bills negotiated to you last post.

“F. de Lizardi & Co.

“1,999 3s.”

The words in the document “for bills negotiated to you last post,” refer to the four drafts previously mentioned. The plaintiffs, however, did not know by or upon whom the bills were drawn, but supposed that the money was due from the defendant to Lizardi for bills negotiated.

Bertram Wodehouse Currie deposed at the trial that it was usual for Lizardi to sell bills on the Exchange, and then to draw an order, like that above set out, on the purchaser of the bills, and that that is the course of business when bills are sold; and that such orders are sometimes accepted by writing “accepted” across them, that is, by the person on whom they are drawn writing his name across the paper, making it payable at his bankers’.

In the course of the same day, Thursday, the 13th of February, checks drawn and bills payable by Lizardi, to the amount of £8,326 3s. 7d., were presented to the plaintiffs’ clerk, at the bankers’ clearing-house, in London, for payment, and were left in the ordinary course of business in his hands. Bankers do not after 4 P. M. receive any check or bill for presentation at the clearing-house, but they have the option of refusing to pay any check or *bill which [157 may have been presented for payment during the day, and returning the same, unpaid, up to 5 P. M.

Shortly before 5 P. M. of the same Thursday, the plaintiffs gave orders to their clerk at the clearing-house not to pay the checks or bills of Lizardi, which had been presented to the plaintiffs for payment in the course of the day, and thereupon the whole of them were returned unpaid, and Lizardi in this manner stopped payment. In fact the plaintiffs did not honor any checks or bills of Lizardi, or pay anything on his account, after the 12th of February.

On Friday morning, the 14th of February, one of the plaintiffs’ clerks left at the defendant’s office in London a notice upon a printed form, of which the following is a copy:

“Light gold cannot be received. A bill on [M. Misa] for [£1,999 3s. 0d.], drawn by [de Lizardi & Co.] ⁽¹⁾ lies due at

(1) The words and figures in brackets were written.

1875

Currie v. Misa.

Messrs. Glynn, Mills & Co., No. 67 Lombard Street. Please to call between two and four o'clock, and on Saturdays before three."

Between 2 P. M. and 3 P. M., of the same Friday, the plaintiffs sent one of their messengers to the defendant's office in London with the document dated February 14th, to inquire whether it would be paid. The messenger saw Mr. Pritchett, the defendant's manager who stated that it would be paid; offered to give the messenger a check for the amount, and, with indignation, asked, "Why the question was asked?" The messenger replied that he did not know, and that he was not authorized to take the check. The messenger, taking back with him the document, then returned to the plaintiffs' bank, and there reported what had taken place at the defendant's office.

About an hour after the plaintiffs' messenger had left the defendant's office, Mr. Pritchett drew a check in the defendant's name upon his bankers, Barnettts, Hoares, Hanburys & Lloyd, for the sum of £1,999 3s., payable to F. de Lizardi & Co., or bearer, which is the check sued on, and sent the same to the plaintiffs' bank by a clerk, who, shortly before 4 P. M. of the same day, Friday, handed the check to a clerk in the plaintiffs' bank and received the document dated February 158} 14th in exchange, and *thereupon the amount of the check was entered in the plaintiffs' books to the credit of Lizardi.

The plaintiffs, upon receiving the defendant's check, sent the same to the clearing-house, where, about 4 P. M. on the same day, it was presented for payment, and handed to a clerk of Barnettts, Hoares, Hanburys & Lloyd.

At the time Mr. Pritchett sent the defendant's check to the plaintiffs' bank he did not know that Lizardi had stopped payment, but being very soon afterwards informed of the fact, he at once instructed the defendant's bankers not to pay the defendant's check, and the same was accordingly refused payment and returned unpaid to the plaintiffs before 5 P. M. on the 14th February, and the amount thereof was, on the morning of the following day, entered in the plaintiffs' books to the debit of Lizardi.

Up to this time the plaintiffs did not know whether Lizardi was solvent or not. At an interview which the plaintiff, Bertram Wodehouse Currie, had with him on the said 14th of February, he protested that he was solvent. This statement was doubted by Bertram Wodehouse Currie.

Shortly after the 13th of February, when Lizardi stopped payment he absconded, and was subsequently adjudicated

a bankrupt, his liabilities amounting to upwards of a million sterling, and his assets amounting to very little indeed.

The document dated February 14th has never been returned to nor demanded by the plaintiffs, and is still in the possession of the defendant.

The following admissions in writing were made by the parties before the trial, namely: That the four drafts purchased by the defendant from Lizardi as afore-mentioned were duly presented for payment to Manuel Francisco Paul, at Cadiz, on whom they were respectively drawn by F. de Lizardi & Co. on the day they respectively became due, and that they were then and there respectively refused payment and were respectively dishonored by Manuel Francisco Paul, and upon the grounds (but without admitting the truth of the grounds) stated in the protest of the 27th of February, 1873; and that the bills were then and there duly protested for non-payment; and that the above facts, as also the *bills and protests, might be given in evidence without calling any witness or witnesses to prove them or any of them. [159]

Some of the securities deposited by Lizardi with the plaintiffs were found to be forgeries, some worthless, and others cannot be realized. The plaintiffs have realized a portion of the said securities which were good, and taking into account the value of the residue, which cannot now be realized, the balance which will ultimately be due from Lizardi to the plaintiffs will be about £20,000.

It was contended on behalf of the defendant at the trial that there was a total failure of consideration as between the defendant and Lizardi for the check sued on, and that the plaintiffs were not holders thereof for value; but the learned judge ruled upon the above facts (neither party desiring that any question should be left to the jury) that the plaintiffs were entitled to recover, and directed the jury to find a verdict for the plaintiffs for £2,090 the amount of the check and interest thereon, and a verdict for that amount was thereupon entered, with leave to move to enter a nonsuit.

In Hilary Term, 1874 (January 14th), the defendant moved the Court of Exchequer, pursuant to the leave reserved, for a rule calling upon the plaintiffs to show cause why the verdict entered for them should not be set aside and the verdict entered for the defendant or a nonsuit.

The court (Kelly, C.B., Pigott and Cleasby, BB.) refused a rule, and the defendant appealed.

1875

Currie v. Misa.

The Court of Appeal is to be at liberty to draw inferences of fact from the facts above stated.

The question for the opinion of the Court of Appeal is whether a rule *nisi* ought to have been refused or granted.

Dec. 3, 1874. *W. Williams*, Q.C. (*Cohen*, Q.C., and *Wood Hill* with him), argued for the defendant.

J. Brown, Q.C. (*Murray* with him), for the plaintiff.

The course of the arguments sufficiently appears from the [160] *judgment. The following cases were referred to: *Crofts v. Beale* ('); *Young v. Cole* ('); *Swift v. Tyson* ('); *Brandao v. Barnett* ('); *Percival v. Crampton* ('); *Poirier v. Morris* ('); *Watson v. Russell* ('); *Whistler v. Forster* ('); *Parsons on Notes and Bills*, vol. i., p. 218.

Cur. adv. vult.

Feb. 11, 1875. The judgment of the court (Keating, Lush, Quain, and Archibald, JJ., Lord Coleridge, C.J., dissenting) was delivered by

LUSH, J.: This is an action on a check, dated the 14th of February, 1873, drawn by the defendant on Messrs. Barnett, Hoare & Co., for payment of £1,999 3s. to Lizardi & Co. or bearer. The material plea is the 5th, which alleges that there never was any consideration for the defendant's making or paying the check, and that the plaintiffs have always held the same without having given any consideration.

We think it must be assumed on the facts stated in the case that if the action had been brought by Lizardi, the defendant would have had a good answer to it, on the ground either of fraud or failure of consideration, it matters not which. The only question therefore is whether, under the circumstances stated, the plaintiffs are to be considered the holders of the check for value.

The material facts bearing on this question may be briefly stated. The defendant had purchased of Lizardi & Co. bills on Cadiz, which were delivered to him on the 11th of February, and which, according to the usual course of business, were to be paid for on the next post day, the 14th. Lizardi was at this time largely indebted to the plaintiffs, who were his bankers, on both his drawing account and a loan account, and he had for several days previously to and again on the 12th of February been pressed for payment or further

(1) 11 C. B., 172; 20 L. J. (C.P.), 186.

(2) 3 Bing. N. C., 724.

(3) 16 Peters, at p. 16.

(4) 6 M. & G., at pp. 667-8.

(5) 2 C. M. & R., 180.

(6) 2 E. & B., 89; 22 L. J. (Q.B.), 313.

(7) 3 B. & S., 34; 31 L. J. (Q.B.), 304.

(8) 14 C. B. (N.S.), 248; 32 L. J. (C.P.), 161.

security. On the 13th he paid in various *checks on [161 account of the balance, and at the same time handed to the plaintiffs the document set out in paragraph 13 of the case, which is designated a "bill."

On the morning of the 14th notice of this "bill," described as lying due at the plaintiffs', was left at the defendant's office, and shortly afterwards the check in question was paid in by the defendant to the plaintiffs' bank, and the "bill" given up to him in exchange for it. The amount of the check was, together with the other checks paid in by Lizardi, entered to the credit of Lizardi's account, and a large balance still remained owing to the plaintiffs. Soon after paying in the check the defendant heard that Lizardi had stopped payment, and he at once instructed his bankers not to honor the check. In consequence of this the check was returned from the clearing-house in the after-part of the day, and on the following morning (the 15th) it was entered in the plaintiffs' books to the debit of Lizardi's account.

The court below, in giving judgment for the plaintiffs, proceeded, partly at least, upon the special circumstance that the check was given to take up the so-called "bill," and considered that this of itself formed a sufficient consideration to entitle the plaintiffs to recover. The argument before us, however, was addressed almost entirely to the broader question, namely, whether an existing debt formed of itself a sufficient consideration for a negotiable security payable on demand, so as to constitute the creditor to whom it was paid a holder for value. As this is a question of great and general importance, and as our opinion upon it is in favor of the plaintiffs, we do not think it necessary to say more with reference to the special circumstance adverted to, than that we are not prepared to dissent from the view taken upon this question by the court below.

It will, of course, be understood that our judgment is based upon what was admitted in the argument, namely, that the check was received by the plaintiffs *bona fide*, and without notice of any infirmity of title on the part of Lizardi. We, therefore, for the purpose of the argument, regard the so-called "bill" as merely an authority to the defendant to pay the amount to Lizardi's bankers, instead of paying it to him, and treat the transaction as if the check had been paid to Lizardi, and he had paid it to *the plaintiffs, not in [162 order that he might draw upon it, but that it should be applied *pro tanto* in discharge of his overdrawn account.

It was not disputed on the argument, nor could it be, that

1875

Currie v. Misa.

if instead of a check the security had been a bill or note payable at a subsequent date, however short, the plaintiffs' title would have been unimpeachable. This has been established by many authorities, both in this country and in the American courts. It has been supposed to rest on the ground that the taking of a negotiable security payable at a future day implied an agreement by the creditor to suspend his remedies during that period, and that this constituted the true consideration which, it is alleged, the law requires in order to entitle the creditor to the absolute benefit of the security. The counsel for the defendant accordingly contended that where the security is a check payable on demand, inasmuch as this consideration is wanting, the holder gains no independent title of his own, and has no better right to the security than the debtor himself had.

We should be sorry if we were obliged to uphold a distinction so refined and technical, and one which we believe to be utterly at variance with the general understanding of mercantile men. And upon consideration we are of opinion that it has no foundation either in principle or upon authority.

Passing by for the present the consideration of what is the true ground on which the delivery or indorsement of a bill or note payable at a future date is held to give a valid title to a creditor in respect of a pre-existing debt, and assuming that it is the implied agreement to suspend, it does not follow that the legal element of consideration is entirely absent where the security is payable immediately. The giving time is only one of many kinds of what the law calls consideration. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other: Com. Dig. Action on the Case, Assumpsit, B. 1-15.

The holder of a check may either cash it immediately, or he may hold it over for a reasonable time. If he cashes it immediately he is safe. The maker of the check cannot [63] afterwards *repudiate, and claim back the proceeds any more than he could claim back gold or bank notes if the payment had been made in that way instead of by check. This was decided in *Watson v. Russell* (¹), with which we entirely agree. In very many—perhaps in the great majority of cases—checks are not presented till the following day, especially where they are crossed, and this usage is so far

(¹) 3 B. & S., 34; 31 L. J. (Q.B.), 304.

recognized by law that the drawer cannot complain of its not having been presented before, even though the banker stop payment in the interval. The loss in such a case falls on the drawer of the check, and not on the holder.

It cannot, we think, be said that a creditor who takes a check on account of a debt due to him, and pays it into his banker that it might be presented in the usual course instead of getting it cashed immediately, does not alter his position, and may not be greatly prejudiced if his title could then be questioned, or that the debtor does not, or may not, gain a benefit by the holding over. If this subject were worth pursuing it would not, we think, be difficult to show that there is no sound distinction between the two kinds of securities of which we have been treating. In the course of the argument it was put to the learned counsel for the defendant whether a debtor who gave his own check in payment of a pre-existing debt could defend an action upon it on the ground that the creditor was not a holder for value, and Mr. Watkin Williams admitted that his argument must go to that extent, and yet it has always been the practice to sue in such a case on the check as well as on the original debt, and no such defence has, as far as we are aware, ever been attempted to be set up, certainly not successfully.

But it is useless to dilate on this point, for, in truth, the title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that given by the Court of Common Pleas in *Belshaw v. Bush* (*) as the foundation of the judgment in that case, namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. *This [164 is precisely the effect which both parties intended the security to have, and the doctrine is as applicable to one species of negotiable security as to another; to a check payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person. The security is offered to the creditor, and taken by him as money's worth, and justice requires that it should be as truly his property as the money which it represents would have been his had the payment been made in gold or a Bank of England note. And, on the other hand, until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, and to sue

(*) 11 C. B., 191; 22 L. J. (C.P.), 24.

1875

Currie v. Misa.

the debtor as if he had given no security. The books are not without authorities in favor of this view, although the point has not, as far as we are aware, been directly decided. Story lays it down in his work on Promissory Notes, s. 186, that a pre-existing debt is equally available as a consideration as is a present advance or value given for the note, without suggesting any distinction between a note payable after date and one payable on demand; and the cases of *Poirier v. Morris* ⁽¹⁾, *Watson v. Russell* ⁽²⁾, before cited, *Whistler v. Forster* ⁽³⁾, and others, contain clear expressions of opinion the same way.

On the part of the defendant the case of *Crofts v. Beal* ⁽⁴⁾ was strongly relied on, where it was held that a promissory note given by a surety for payment on demand without any new consideration was *nudum pactum*. It is sufficient to say of that case that the note was payable to the plaintiff, and not to order or bearer, and was not therefore a negotiable security. *De la Chaumette v. Bank of England* ⁽⁵⁾ appears at first sight to be more in point, but there, although it appeared as between the plaintiff and O., by whom the bank note in question was remitted, that the state of account was in favor of the plaintiff, it is not really so, for the note had not been remitted in payment, but merely for collection [65] *as agent, and the court held that under these circumstances the plaintiff had no better title than O. For these reasons we are of opinion that a creditor to whom a negotiable security is given on account of a pre-existing debt holds it by an indefeasible title, whether it be one payable at a future time or on demand, and that, therefore, the judgment of the court below ought to be affirmed.

My Brother Quain, who concurs in the judgment, desires to add that he does not adopt all the reasoning as to consideration.

LORD COLERIDGE, C.J.: In this case I am unable to assent to the conclusion at which the other members of the court have arrived. I am painfully conscious of the great weight of authority against me, but as at last I remain unconvinced, it is my duty to say so, and also shortly to say why.

I need not repeat, because I entirely assent, and cannot add to the statement of the facts of the case, with which the judgment prepared by my Brother Lush sets out.

I proceed to consider the law, assuming the perfect correctness of the facts as stated by him, and being of opinion

⁽¹⁾ 2 E. & B., 89; 22 L. J. (Q.B.), 313. ⁽²⁾ 14 C. B. (N.S.), 248; 32 L. J. (C.P.), 161.

⁽³⁾ 3 B. & S., 34; 31 L. J. (Q.B.), 304. ⁽⁴⁾ 11 C. B., 172; 20 L. J. (C.P.), 186.

⁽⁵⁾ 9 B. & C., 208.

that on those facts the fifth plea is made out, and that the defendant is entitled to our judgment.

It is important to state what I understand to be the exact proposition contended for by the defendant, and, as I think, contended for rightly. It is this: If the drawer of a check pay it into a banker to the account of a third person, and the consideration as between the person to the credit of whose account the check has been paid and the drawer of the check wholly fails, so that as between those two parties the drawer would have a perfect answer to any action on the check, then the drawer may stop payment of, and has an answer to any action on, the check, as against the bankers who have received it, unless in the meantime they have in some way given some value for it; as by paying money, or giving credit or some other advantage, to the customer to whose account it has been paid in, or by altering their own position in some way in consequence of having received the check and on the faith of its being paid.

Now, it is too late to dispute that a pre-existing debt due to the *transferee of a bill entitles him to all the rights of [166 a holder for value. But it seems equally clear that this is an exception to general rules, an extraordinary protection given to such a holder on grounds of commercial policy only, and in order to favor the unrestricted use as currency of negotiable instruments. "It is," says Chancellor Kent, in the well-known case of *Bay v. Coddington* ⁽¹⁾, "the credit given to the paper, and the consideration *bona fide* paid on receiving it, that entitles the holder, on grounds of commercial policy to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it." Mr. Justice Willes uses language very much the same in *Whistler v. Forster* ⁽²⁾. "The general rule of law is undoubted, that no one can transfer a better title than he himself possesses: *Nemo dat quod non habet*. To this there are some exceptions; one of which arises out of the law merchant as to negotiable instruments. These being part of the currency are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud, which would have rendered it unavailable in the hands of a previous holder." It would be wasting time to quote other authorities to the same effect: these are sufficient to show the grounds of sense and substance on which the law as to bills is supported. Nor, if it

⁽¹⁾ 5 Joh. Ch. Ca., 54.

⁽²⁾ 14 C. B. (N.S.), 248; 32 L. J. (C.P.), 161.

be necessary to have recourse to it, is the technical element of consideration wanting between the transferor and the transferee of such an instrument. Whether the true view be that adopted by Sir John Byles (Byles on Bills, 10th ed., p. 39), that that a bill or note payable at a future day suspends until its maturity the remedy for the antecedent debt; or that adopted by my Brother Lush, from the judgment of the Court of Common Pleas in *Belshaw v. Bush* (¹), that it is a conditional payment of the debt, the debt reviving if the security is not realized; in either view there is consideration which may enter into but is not the whole reason for the protection given to the *bona fide* holder of such an instrument. The whole [67] *reason certainly does not apply to the case of a check, and the true question, with deference, appears to me to be whether, apart from the reasons which protect the *bona fide* holder of bills payable at a future day, which do not apply, there are any reasons or authorities which do apply to protect the *bona fide* holders of checks given under such circumstances as the check was given in this case.

As to authority, no case has been cited in which this point has been decided, yet it is certain that a case would have been cited if it could be found. There is, indeed, a *dictum* of the Lord Chief Justice of the Queen's Bench, in *Watson v. Russell* (²), to the effect that there is no difference between a bill and a check in the hands of a holder for value. But that *dictum* must be taken with the facts of that case, in which neither was the plaintiff a banker, nor was the consideration for the check an antecedent debt. No authority, as I have said, has been cited on which the point has been decided. Yet it surely needs one. The doctrine as to bills of exchange has been established after many disputes and much resistance; is it likely that in the case of checks no one who has been defrauded has ever resisted payment until now, but that every one has so felt the sense and reason of the rule contended for, that it has been acquiesced in without a struggle? I think not, and I cannot find, on the best information I have been able to get, that the general understanding is what my Brother Lush believes it to be. On the contrary, my impression is that the opinions of men of business are much divided on this subject, and that if the court were to decide, as I think it ought, in favor of the defendant, the consequences to mercantile transactions would be by no means so serious as it has been too much taken for granted they would be. And even if the matter of fact were clearer than it is, the under-

(¹) 3 B. & S., 34; 31 L. J. (Q.B.), 304. (²) 11 C. B., 191; 22 L. J. (C.P.), 24.

standing of mercantile men, though on such a subject entitled to deference, cannot and ought not to determine the question. Apart, then, from authority, which is wanting, how stands the thing in sense? I take a case of gross and direct fraud, for to such a case the argument, if it is good for anything, must extend. A man is cheated out of a check [168 for a large sum in favor of A.; A., who has cheated him, pays the check into his bankers, between whom and himself there have been large dealings greatly to the bankers' advantage. At the moment when the check is paid in, A. is overdrawn, and thereupon, nothing more happening, the banker claims the value of the check against the cheated drawer, and denies the drawer's right to protect himself against the fraud of A. by stopping his check, simply and solely on the ground that the fraudulent man has been allowed by the banker to overdraw his account. I can see no reason or justice in this. If either the drawer or the banker must suffer to the extent of the value of the check, it seems to me much more reasonable and just that he should suffer who, with his eyes open, and to a person he knows, has gone on making advances, than he who has been directly defrauded, often in a first and single transaction, and also has often no means whatever of protecting himself against fraud. To me the rule seems hard in case of money, but it is well settled. It seems hard in the case of bills due at a future date, which are said to be like money, and to stand upon the same foot; but that is also well settled. But checks are not money; no rule, as far as I can find, either of practice or of law, is settled with regard to them, and I am not willing to make a rule as to checks in favor of bankers which is not just in itself, and which is not defensible, at least upon the grounds on which the rules as to money and as to bills are defended.

It is said that the distinction between a bill and a check is a refined one, but it is to be observed, first, that where a line is drawn, cases close to this line, but on different sides of it, must needs be separated by a distinction which is refined; and next, that we are here dealing with an exception to a general rule, and the burden of proof and stress of argument seem to me to lie rather on those who say, than on those who deny, that it is within the exception. It is for those who assert it to make it out, and the absence of direct affirmative authority in such a case is, to my mind, strong authority in the negative.

It has, however, been argued that the legal element of consideration is not entirely absent where a check is given,

1875

Currie v. Misa.

[169] because *it is payable immediately; and my Brother Lush has put together, from Comyns's Digest, Action on the Case, Assumpsit, B. 1-15, a definition or description of consideration, to the accuracy of which I entirely assent. It is sought to draw from this definition the conclusion that the practice, by no means uniform or binding, of allowing twenty-four hours to elapse between the drawing or receipt and presentment of a check constitutes a new consideration as between the drawer and the payee. I can not assent to this view. It assumes the substantial identity of a check with other instruments from which it differs. "A check," says Mr. Justice Story, Promissory Notes, 8th ed., p. 674, "is an absolute appropriation of so much money in the hands of a banker to the holder of the check, and there it ought to remain until called for. In truth," he goes on, "a check is an instrument *sui generis*, and is construed exactly as the parties intend it. It is supposed to be drawn upon funds in the hands of the banker as banker, and it appropriates the amount to the holder of the check." To the same effect is the judgment of Sir John Byles in *Keene v. Beard* ('): "A check is an appropriation of so much money of the drawer in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person;" and in commenting on *De la Chaumette v. Bank of England* ("), the same learned person draws the very distinction which is insisted upon here in the defendant's favor. "It would seem to follow," says he (Byles on Bills, 10th ed., p. 39), "as a general rule, that whenever a bill or note payable on demand is remitted to a creditor in liquidation of an existing debt only, and no fresh credit is given or advances made by the creditor on the faith of the instrument, he may be treated by the parties liable on it as the agent of the debtor from whom he received it: a doctrine which, while it cannot injure the creditor (for if he cannot recover, still he is but where he was before he received the remittance), would no doubt tend to prevent gratuitous, fraudulent, or felonious holders of paper from obtaining its value by paying it away to their creditors; but it is conceived that in general a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for [170] value." And in a note to this passage he *observes: "It is to be recollected that a *bill* or note payable at a future day suspends till its maturity, the remedy for the antecedent debt. There may, therefore, in this respect be a

(') 8 C. B. (N.S.), at p. 381; 29 L. J. (C.P.), 287.

(") 9 B. & C., 208.

difference between an instrument payable on demand and one payable at a future day."

There is, therefore, nothing to bind a banker not to present a check paid in till the next day. In practice, I believe it happens constantly that they are presented at once. Although, therefore, there may be an expectation of forbearance for twenty-four hours upon the giving of the check, the giving of it is no consideration to forbear, and it is fallacious to confuse things in their nature different.

There are not, as we have seen, any cases directly upon checks, but there are some upon the subject of bank notes, to which it may be proper to advert. In *Solomons v. Bank of England*, which is reported in a note to *Lowndes v. Anderson* ⁽¹⁾, the plaintiffs were London merchants in advance to foreign correspondents. A note had been fraudulently obtained, and had been stopped at the bank by the person defrauded. The plaintiffs were innocent of the fraud, and had received the note to be applied in diminution of an existing debt. There was evidence to connect the foreign correspondents with the fraud; and Lord Kenyon held, at *nisi prius*, and the King's Bench afterwards supported the ruling, that the London merchants had given no consideration; that they were, therefore, mere agents to receive the amount of the note from the bank; that they could be in no better position than their principals; and, as Mr. Justice Buller expressed it in banco, "they must stand or fall by the title of their foreign correspondents." This case was decided in 1791, and it came under the consideration of the King's Bench in 1829, in the case of *De la Chaumette v. Bank of England* ⁽²⁾. In that case two bank notes had been fraudulently obtained, and were remitted from abroad to the plaintiff, an English merchant, who was, at the time he received them, largely in advance to the foreign remitter. It was held by Lord Tenterden and the Court of King's Bench, that the plaintiff could only recover on the title of the foreign sender. "It appeared," says Lord Tenterden, giving the judgment of the court, * "that at the time when the [171] note was remitted to the plaintiff the balance as between him and Odier & Co., the foreign senders, was £7,000 in favor of the plaintiff; but he did not, in consequence of having received the note, make any further advance or give any further credit to Odier & Co., than he would have done if the note had not been transmitted. Unless, therefore, we were to lay down a rule that a party who holds a note, however obtained, may, by merely remitting it to a person to

⁽¹⁾ 13 East, 135.

⁽²⁾ 9 B. & C., 208.

whom he is indebted; enable him to sue, we must say that the plaintiff must be considered as representing Odier & Co., and that, if he can recover at all, it must be upon their right." A Bank of England note is not a check, no doubt, but neither is a check an unmatured bill. To hold that the plaintiffs cannot recover in this case, except on Lizardi's title, and that they were his agents to receive the defendant's check, is not in conflict with any of the cases which have been decided on bills of exchange, while it is, I think, in accordance with the principles of the two cases I have last mentioned, as well as with real justice.

I am not aware that these cases at all interfered with the negotiability of bank notes; and I do not think that the negotiability of checks will be injured if this case were decided as I should wish to decide it.

There remains the smaller question whether the special circumstance that a so-called "bill" was given up on receipt of the check formed of itself a sufficient consideration to entitle the plaintiffs to recover? I need say no more than that I think it did not. The so-called bill was not a bill, it was a mere memorandum and inchoate, and its relinquishment was the giving up of nothing which can be called a consideration. For these reasons I am of opinion that the judgment of the court below should be reversed.

Judgment affirmed.

Attorneys for plaintiffs: *Murray, Hutchins & Co.*

Attorneys for defendant: *Darves & Son.*

Any defence available against the payee may be set up against the holder of a negotiable note, unless the holder received the same in the usual course of trade, i. e., paid money or property, incurred liability, or relinquished some right upon the faith and credit of the note: *Payne v. Cutler*, 13 Wend., 605; *Lawrence v. Clark*, 36 N. Y., 129-130; *Root v. French*, 13 Wend., 570; *Denniston v. Bacon*, 10 Johns., 198.

See *Woodruff v. Hill*, 116 Mass., 310.

Where the real owner or maker of negotiable paper or securities shows the same were stolen from him, were diverted from the purpose for which they were issued, were fraudulently obtained from him, or was illegal in its inception, the burthen is upon the party claiming as holder thereof to show he took the same in the natural course of business, before due and for value.

Alabama: *Thompson v. Armstrong*, 7 Ala., 256; *Boyd v. McIsor*, 11 Ala., 822; *Minell v. Reed*, 26 Ala., 780; *Ross v. Drinkard*, 35 Ala., 434; *Harwick v. Andrews*, 9 Porter, 9.

Arkansas: *Bertrand v. Backman*, 13 Ark. (8 Eng.), 150.

California: *Sherry v. Spaulding*, 45 Cal., 544; *Fuller v. Hutchings*, 10 Cal., 523; *Palmer v. Goodwin*, 5 Cal., 458.

Canada (Upper): *Maulson v. Arrol*, 11 Queen's Bench R., 81; *Hanscome v. Cotton*, 15 Q. B., 42.

England: *Wyat v. Campbell*, *Moody & Malkin*, 80; *Bailey v. Bidwell*, 18 Mees. & Welsb., 73; *Hall v. Featherstone*, 3 Hurl. & Norm., 284; *Bingham v. Stanley*, 9 C. & P., 374; *Hogg v. Skeen*, 18 C. B., N. S., 426; *Heath v. Sansom*, 2 B. & Adolph., 291, 22 Eng. C. L.; *Smith v. Braine*, 16 Q. B., 244, 71 Eng. C. L.; *Berry v. Alderman*, 14 C. B., 95; *Harvey v. Towers*, 6 Exch.,

660, 4 Eng. Law & Eq., 581; *Fitch v. Jones*, 5 Ell. & Bl., 238; *Edmunds v. Groves*, 2 M. & W., 642.

Florida: *Prescott v. Johnson*, 8 Florida, 391.

Georgia: *Nell v. Snowden*, 5 Geo., 1; *Dickerson v. Burke*, 25 Geo., 226.

See *Bond v. Central Bank*, 2 Geo. (2 Kelly), 92.

Indiana: See *Riley v. Schawacker*, 50 Ind., 592.

Iowa: *Rock Island, etc., v. Nelson*, 3 Cent. Law Jour., 6; *Woodward v. Rogers*, 31 Iowa, 842; *Lane v. Krekel*, 22 Iowa, 399.

But see *Kelly v. Ford*, 4 Iowa, 140; *Lathrop v. Donaldson*, 22 Iowa, 284.

Kentucky: *Breckenridge v. Moore*, 3 B. Monr., 686; *Early v. McCart*, 2 Dana, 414.

Louisiana: *Union Bank v. Ryan*, 21 La. Ann., 551; *Louisiana, etc., v. Orleans, etc.*, 8 La. Ann., 294; *Judson v. Holmes*, 9 La. Ann., 20; *Wheeler v. Maillet*, 20 La. Ann., 75.

Maine: *Roberts v. Lane*, 64 Maine, 108; *Aldrich v. Warren*, 16 Maine, 465; *Perry v. Noyes*, 39 Maine, 384; *Gallagher v. Black*, 44 Maine, 99.

Maryland: *Ellicott v. Love*, 6 Md., 509; *Given v. Lee*, 1 Maryland Chy., 445.

Massachusetts: *Haskins v. Warren*, 115 Mass., 514; *Tucker v. Morrill*, 1 Allen, 528; *Sistermans v. Field*, 9 Gray, 331; *Russell v. Morgan*, 11 Cush., 198; *Holden v. Cosgrove*, 12 Gray, 216; *Munroe v. Cooper*, 5 Pickering, 412.

See *Eastabrook v. Boyle*, 1 Allen, 412; *Smith v. Edgewood*, 3 Allen, 233; *Clark v. Hayer*, 105 Mass., 216.

It is otherwise as to a bank bill: *Tryer v. Union Bank*, 11 Cush., 51.

Michigan: *Carrier v. Cameron*, 31 Mich., 873; *Paton v. Coit*, 5 Mich., 505.

Minnesota: *Cummings v. Thompson*, 18 Minn., 246.

Mississippi: *Winsted v. Davis*, 40 Miss., 785; *Craig v. City*, 31 Miss., 216.

See *Harris v. Pike et al.*, 48 Mississippi, 46.

Missouri: This seems to be the only state which does not follow the rule laid down. Its courts hold that proof of fraudulent or illegal origin of the paper does not cast the burthen of showing good faith upon the holder: *Corby v. Butler*, 55 Mo., 398; *Horton v.*

Bayne, 52 Mo., 531; *Hamilton v. Marks*, 52 Mo., 78; *State v. Sakine Co.*, 45 Mo., 249; *Henderson v. Bondurant*, 39 Mo., 372.

Nevada: *Siera v. Sears*, 10 Nev., 346.

New Hampshire: *Perkins v. Prout*, 47 N. H., 387; *Garland v. Lane*, 46 N. H., 245; *Clark v. Pease*, 41 N. H., 414.

New York: *Wilson v. Rocks*, 58 N. Y., 642; *Atlantic, etc., v. Franklin*, 55 N. Y., 235; *Moore v. Metropolitan, etc.*, 55 N. Y., 41; *Devoe v. Brandt*, 53 N. Y., 462; *Farmers, etc., v. Noxon*, 45 N. Y., 762; *First, etc., v. Green*, 43 N. Y., 298; *Houghton v. McAuliffe*, 2 Abb. Court App. Dec., 409, 26 How. Prac., 270; *Case v. Mechanics' Bank*, 4 N. Y., 166; *Porter v. Knapp*, 6 Lansing, 125; *Tallman v. Turck*, 26 Barb., 167; *Reed v. Sands*, 37 Barb., 185; *Lee v. Swift*, 1 Denio, 565; *Woodhull v. Holmes*, 10 Johns., 281; *Seeley v. Engell*, 17 Barb., 530; *Farrington v. Frankfort Bank*, 31 Barb., 188; *Micklethwaite v. Thebaud*, 4 Sandf., 97; *N. Y., etc., v. Gibson*, 5 Duer, 574; *Catlin v. Hanson*, 1 Duer, 309; *Hart v. Potter*, 4 Duer, 458; *Ross v. Bedell*, 5 Duer, 462; *Fulton, etc., v. Phoenix, etc.*, 1 Hall, 562; *Saloman v. Praag*, 48 How. Prac., 340.

But see *Hill v. Northrup*, 1 Hun, 512, 4 N. Y. Supreme Ct. Rep., 120.

Ohio: *Davis v. Bartlett*, 12 Ohio St. Rep., 534; *McKesson v. Standbury*, 3 Ohio St. Rep., 156.

Pennsylvania: *Robinson v. Hodgson*, 73 Penn. St. Rep., 202; *Dingman v. Amsink*, 77 Penn. St. Rep., 114; *Gray v. Bank*, 29 Penn. St. R., 365; *Holme v. Karsper*, 5 Bin., 469; *Jarden v. Davis*, 5 Whart., 838; *Hutchinson v. Boggs*, 28 Penn. St. Rep., 294; *Porter v. Gunnison*, 2 Grant's Cas., 297; *Albeitz v. Mellon*, 37 Penn. St. Rep., 367; *Hoffman v. Foster*, 43 Penn. St. Rep., 137; *Maples v. Brown*, 48 Penn. St. Rep., 458.

South Carolina: *Scharb v. Clark*, 1 Strobb., 299; *McCaskill v. Ballard*, 8 Rich., 470.

Texas: *Whithed v. McAdams*, 18 Tex., 551.

But see *Watson v. Flanagan*, 14 Tex., 354.

United States: *Smith v. Sack Co.*, 11 Wall., 139, 147; *McClintock v. Cummings*, 2 McLean, 98.

1875

Currie v. Misa.

But see *Swift v. Tyson*, 16 Peters, 1, 16.

Vermont: *Sandford v. Norton*, 14 Vermont, 228.

Virginia: *Vathir v. Zane*, 6 Gratt., 246.

Wisconsin: See *Bowman v. Van Keuren*, 29 Wisc., 209.

On proof by plaintiff that he paid value for the note, that it was transferred to him before due and in the usual course of trade, it is not incumbent upon him to prove he received it in ignorance of defendant's rights: *Davis v. Bartlett*, 12 Ohio St. R., 534.

But nothing short of one of these facts will impose the burthen of good faith upon the purchaser. A partial or total failure of consideration, payment, or matter going to discharge the instrument, a counterclaim against the payee or other subsequent holder, matter arising after delivery to the payee will not shift the burthen of proof.

Arkansas: See *Bertrand v. Barkman*, 13 Ark. (8 Eng.), 150.

England: *Smith v. Braine*, 3 Eng. L. & Eq., 379; *Fitch v. Jones*, 5 Ell. & Bl., 238, 85 Eng. C. L.; *Musgrave v. Drake*, 5 Q. B., 185 (see the latter case distinguished, 18 C. B. (N.S.), 426).

Georgia: *Dickerson v. Burke*, 25 Geo., 226.

Iowa: *Nelson v. Rock Island, etc.*, 3 Cent. Law Jour., 6. The reader should consult the elaborate note following this case: *Hull v. Marshall Co.*, 12 Iowa, 162.

Louisiana: *Giovanovich v. Citizen's Bank*, 26 Louis. Ann., 15; *Judson v. Holmes*, 9 La. Ann., 20; *Tew v. Labiche*, 4 La. Ann., 526.

Maryland: *Ellicott v. Low*, 6 Maryland, 509.

Missouri: *Shirts v. Overjohn*, 2 Cent. Law Jour., 431.

New Hampshire: *Horn v. Thompson*, 31 N. H., 562.

New York: *Mechanics, etc.*, v. *Crow*, 60 N. Y. R., 85; *Ross v. Bedell*, 5 Duer, 462; *James v. Chalmers*, 5 Sandf., 52, affirmed 6 N. Y., 209; *Bank v. Barry*, 1 Denio, 116; *Potter v. Chadsey*, 16 Abb. Pr., 146.

But see *Rogers v. Morton*, 12 Wend., 484; *Pollard v. Rocke*, 36 N. Y. Superior Court Rep., 301; *Ross v. Bedell*, 5 Duer, 462.

Ohio: *McKesson v. Stanberry*, 3 Ohio St. R., 156.

Pennsylvania: *Dingman v. Amink*, 77 Penn. St. Rep., 114; *Soan v. Union, etc.*, 67 Penn. St. Rep., 470; *Phelan v. Moss*, 67 Penn. St. R. 59; *Gray v. Bank*, 29 Penn. St. R., 365; *Knight v. Pugh*, 4 Watts & Serg., 445.

Rhode Island: *Atlas, etc.*, v. *Doyle*, 9 Rhode Island 76.

Texas: *McAlpin v. Finch*, 18 Texas, 831; *Watson v. Flanagan*, 14 Texas, 354.

United States: *Swift v. Tyson*, 16 Peters, 1, 16.

Virginia: *Wilson v. Lazier*, 11 Gratt., 477.

Wisconsin: *Kinney v. Kruse*, 28 Wisc., 188.

It is not sufficient to defeat the rights of a *bona fide* purchaser that he might have obtained notice of equities against the paper by the exercise of active vigilance: *Belmont, etc.*, v. *Hoge*, 35 N. Y. Rep., 65.

If the defendant wishes to claim and justify as a *bona fide* holder he must plead that he purchased without notice of the plaintiff's title, claim or equity, and that he purchased for a valuable consideration actually paid on the faith of such purchase: *Weaver v. Burden*, 49 N. Y., 286; *Jewett v. Palmer*, 7 Johns. Chy., 65.

See also *Catlin v. Hansen*, 1 Duer, 309.

Where there is no limitation or restriction as to the manner in which an accommodation note is to be used, the payee has a right to apply it to the payment or security of an antecedent debt, or to sustain his credit in any other way: *Cole v. Saulpaugh*, 48 Barb., 104; *Schepp v. Carpenter*, 51 N. Y., 602; *Duel v. Spence*, 1 Abb. Ct. App. Dec., 559, 1 Abb. Prac., 237; *East, etc.*, v. *Butterworth*, 30 How. Prac., 444; *Robbins v. Richardson*, 2 Bosw., 248.

See also *President v. McSpadden*, 33 Barb., 81, affirmed 3 Abb. Court Appeals Dec., 133.

A mere expectation or intention that the note will be used for a specific purpose is not sufficient to constitute a defence thereto though used for another purpose: *Corbitt v. Miller*, 43 Barb., 305.

If a note be left with a third person as an escrow and the latter without authority or negligence on the part of the maker deliver it, even a *bona fide* pur-

chaser of negotiable paper cannot recover thereon, for it was never delivered: *Chipman v. Tucker*, 38 Wisc., 43; *Roberts v. McGrath*, 38 Wisc., 52; *Roberts v. Wood*, 38 Wisc., 60.

The holder of a note transferred in payment of a note already due is a holder for value: *Brown v. Leavitt*, 31 N. Y., 113; *Mechanics, etc., v. Crow*, 5 Daly, 191, 60 N. Y., 35.

The surrender to a party of his own negotiable note past due, and taking in lieu thereof a negotiable note before its maturity, is a sufficient parting with value to constitute the party a *bona fide* holder of the latter note: *Pratt v. Coman*, 37 N. Y., 440.

In this case the court (p. 441) quotes and approves the language of the Court of Appeals, in *Youngs v. Lee*, 12 N. Y., 551. "Admitting that the plaintiff could have recovered against Bell & Goodman the amount surrendered under the facts stated, it does not follow that they have parted with nothing of substantial value. Their demand against Bell & Goodman, in the shape of negotiable bank paper, was better and more available, on many accounts, than if it remained in an open and unliquidated account."

The court also (p. 442) quotes with approval, the language of the old Supreme Court, in *Bank v. Babcock*, 21 Wend., 499: "The court ought not to speculate about the probability of reviving these canceled securities, in case the paper upon the strength of which they were canceled, should turn out to be unavailable. Much less ought we to go into the chances of a revival, as a ground of defeating a substituted security."

See also *Powers v. Freeman*, 2 Lans., 183.

To same effect: *Paddon v. Taylor*, 44 N. Y., 371, 374; *Chrysler v. Renots*, 43 N. Y., 209, 211, 212; *Youngs v. Lee*, 12 N. Y., 551, affirming 18 Barb., 187; *Boyd v. Cummings*, 17 N. Y., 101; *Essex County Bank v. Russell*, 29 N. Y., 673; *Clothier v. Adriance*, 51 N. Y., 322, 326; *Mechanics' Bank v. Wixson*, 42 N. Y., 438, 442; *Bank v. Scoville*, 21 Wend., 115; *Mohawk Bank v. Corey*, 1 Hill, 513; *Powers v. Freeman*, 2 Lansing, 127, 133; *Stettheimer v. Meyer*, 33 Barb., 215, 217, 218; *Fisher v. Marvin*, 47 Barb.,

159; *Bank v. Babcock*, 21 Wend., 498; *Scott v. Betts*, Lalor's Sup., 363; *Atlantic, etc., v. Franklin*, 64 Barb., 449; *Traders' Bank v. Bradner*, 43 Barb., 379; *New York, etc., v. Smith*, 4 Duer, 362; *Ingraham v. Baldwin*, 12 Barb., 20, 21; *McGuire v. Sinclair*, 47 How. Prac., 360; *City Bank v. Smith*, 20 Upper Can. Com. Pl., 93.

The rule that where a promissory note is indorsed and delivered before it falls due, in payment, at maturity, of a note held by the transferee, which latter note is delivered up, the transaction constitutes the transferee a holder for value, applies equally whether the note surrendered is not due or is overdue: *Day v. Saunders*, 1 Abb. Court App. Dec., 495; *Mechanics v. Crow*, 5 Daly, 191, 60 N. Y., 35.

The opinion in 3 Keyes, 347, and 37 How., 534, was not delivered, but the judge who wrote it concurred in the one given in Abbott. (See Mr. Abbott's note, 1 Abb. Court App. Dec., 496).

See also *Seymour v. Wilson*, 19 N. Y., 417.

The rule is the same, even though the parties to the notes surrendered were insolvent, and the notes therefore worthless: *Park Bank v. Watson*, 42 N. Y., 490.

The acceptance of a note not due prevents an action upon the surrendered paper until the former falls due: *Pratt v. Coman*, 37 N. Y., 442, 443; *Mechanics' Bank v. Wixson*, 42 N. Y. Rep., 442; *Thompson v. Gray*, 63 Maine, 228; *York v. Pearson*, 63 Maine, 587; *Putnam v. Lewis*, 8 Johns., 889; *Copper v. Powell*, Anthon's N. P., 68; *Place v. McIlwain*, 1 Daly, 267, affirmed 38 N. Y., 96.

The purchaser must actually surrender the negotiable security given in payment: *Bright v. Judson*, 47 Barbour, 29.

And the seller must actually deliver the paper transferred by him: *Russell v. Scudder*, 42 Barb., 31.

An extension of time, however short, by a valid agreement is a sufficient consideration to make one a *bona fide* holder: *Carey v. White*, 52 N. Y., 188; *Burns v. Rowland*, 40 Barb., 368; *Traders' Bank v. Bradner*, 43 Barb., 379; *Currie v. Misa*, post, p. 592.

See however *Cram v. Wilson*, 14 Abb. Prac., N. S., 374.

The agreement for extension must

1875

Currie v. Misa.

however be a valid agreement for some definite extension: *Atlantic Bank v. Franklin*, 55 N. Y., 235.

But the mere taking of a collateral security is not *per se*, in the absence of any agreement beyond it, an extension of time for the payment of the original debt: *Carey v. White*, 52 N. Y., 188; *Taylor v. Allen*, 86 Barb., 294.

See *Burns v. Rowland*, 40 Barb., 368; *Place v. McIlvain*, 1 Daly, 206, 38 N. Y. Rep., 96.

Where the creditor made a loan to the maker of a note under an agreement that he should pay the loan out of the proceeds of its discount or deliver the note to the lender, and he did the latter in satisfaction of the loan, held the holder was a holder for value: *Smith v. Mulock*, 1 Abb. Prac., N. S., 375.

The discharge of a precedent debt of the seller is a sufficient consideration to make the vendee a *bona fide* holder as against creditors at large of the vendor: *Seymour v. Wilson*, 19 N. Y., 417; *Birdseye v. Ray*, 4 Hill, 158, affirmed 5 Denio, 619; *Tousley v. McDonald*, 32 Barb., 604, 611.

See *Wood v. Robinson*, 22 N. Y., 564.

But not of a creditor having a specific prior lien by chattel mortgage not refilled: *Thompson v. Van Vechten*, 27 N. Y., 568; *Tiffany v. Warren*, 37 Barbour, 571, 24 How. Prac., 293; *Wiles v. Clapp*, 41 Barb., 645.

The transfer to the vendor by the vendee of a worthless claim against a third person would not make the vendor a *bona fide* purchaser: *Seymour v. Wilson*, 19 N. Y., 417; *Stewart v. Small*, 2 Barb., 559.

An agreement that a debt due from the seller to the purchaser shall be applied upon the purchase price of property sold will not constitute a payment to take the agreement out of the statute of frauds: *Mattice v. Allen*, 3 Abb. Court Appeals Dec., 248, reversing 33 Barb., 543; *Brabin v. Hyde*, 32 N. Y., 519, reversing 30 Barb. 265; *Archer v. Zeh*, 5 Hill, 200; *Ely v. Ormsby*, 12 Barb., 570; *Clark v. Tucker*, 2 Sandf. 137; *Story on Sales*, § 273 a; *Good v. Curtiss*, 31 How. Prac., 4; *Brand v. Brand*, 49 Barb., 346, 350; *Gillman v. Hill*, 36 N. H., 311; *Browne*, Statute of Frauds, §§ 342, 342 a.

It seems that an actual application of a debt in payment, and giving a receipt

therefor as such, would be sufficient payment: *Clark v. Tucker*, 2 Sandf., 157; *Gillman v. Hill*, 36 N. H., 311; *Brabin v. Hyde*, 32 N. Y., 519.

If a note be made to take up other notes and it be substantially and in substance applied to their payment, it may be collected though such former notes were not actually surrendered: *Spencer v. Ballou*, 18 N. Y., 327; *Craver v. Wilson*, 14 Abb. Prac., N. S., 378-9; *Place v. McIlvain*, 1 Daly, 206; *Duel v. Spence*, 1 Abb. Court Appeals Dec., 559, 1 Abb. Prac., 237, Court Appeals.

But see *Kasson v. Smith*, 8 Wend., 437; *Corbitt v. Miller*, 43 Barb., 305.

Defendant having indorsed a note for \$1,230, for the purpose of enabling the maker to obtain, as an additional advance, the difference between that sum, and an original loan of \$918 advanced to him before the making of the note, which additional advance was, however, not made: Held, that the defendant was not liable, as indorser for the \$918 originally loaned, and that a plea setting up the above facts was good: *Greenwood v. Perry*, 19 Upper Can. C. Pl., 403; *Stone v. Compton*, 5 Bing. N. C., 142, 35 Eng. Com. Law Rep.; *Prentiss v. Graves*, 33 Barb. 621; *Beeman v. Lovett*, 46 Cal., 387.

In *Craver v. Wilson*, 14 Abb. Prac., N. S., 374 (Court of Appeals), a mortgage was made to enable the mortgagor's husband to raise money. A. lent the husband the sum contemplated upon another security and took the mortgage as security for the payment of a judgment upon which he agreed to stay proceedings. Held, the mortgage was invalid.

The giving of a bill of exchange drawn by one party in exchange for the promissory note of the other for the same amount, furnishes a good consideration for the latter and a diversion of the note is no defence: *Newman v. Frost*, 52 N. Y., 422.

So if for any reason it be founded on a valid consideration: *Moore v. Ward*, 1 Hilton, 387.

If the payee is guilty of positive laches to the detriment of the drawer the former must bear the loss, as where for want of notice of dishonor the drawer lost the right to file a mechanic's lien: *Newman v. Frost*, 52 N. Y., 422.

A. ordered brokers to buy stocks for

him, which the latter the same day purchased, to be delivered three days after. On the day of the purchase A. stole B.'s bonds, and before the brokers delivered the stocks, A., at the expiration of the three days, hypothecated them with the brokers as a "margin." Held, the brokers gave credit to A.'s contract; that the receipt of the bonds and the fulfilment of the contract for the purchase of the stock after such receipt did not make them *bona fide* holders: Held further, that if the brokers, after the receipt of the bonds, purchased upon the credit thereof, any stocks for A., they were entitled to hold them as security for any loss arising on that transaction, but the sale of bonds beyond the amount necessary for such indemnity was a conversion, for which an action would lie: *Taft v. Chapman*, 50 N. Y., 445; see *S. C.* on second appeal, 1 Weekly Dig., 483.

When the purchaser of stocks or negotiable paper not due, applies a portion of the purchase money upon a precedent debt, and parts with value for the residue, he is a purchaser for value only to the extent of the latter: see note 9 Eng. Rep., 115; *Weaver v. Barden*, 49 N. Y., 286; *Taft v. Chapman*, 50 N. Y., 445; *Cardwell v. Hicks*, 87 Barb., 458, 28 How. Prac., 281; *Williams v. Smith*, 2 Hill, 301; *Stevens v. Corn Exchange Bank*, 3 Hun, 147; *Bromley v. Walker*, 51 Barb., 208; *Kitteridge v. Chapman*, 36 Iowa, 348.

So if a bank credit the holder with a fraudulent check, it is protected only to the extent of money it has actually paid to the depositor before notice: *Justh v. Lawrence*, 56 N. Y., 478.

See *Gould v. Segre*, 5 Duer, 260; *Tilden v. Blair*, 21 Wallace, 241.

In New York it is held, where one accepts a negotiable promissory note not yet due, in payment of a precedent debt not evidenced by any writing or written acknowledgment, and not accompanied by any security, parted with by the transferee, he does not thereby become a holder for value as against one who parted with the paper for a specific purpose from which it was diverted: *Coddington v. Bay*, 20 Johns., 687; *Rochester v. Taylor*, 23 Barb., 18; *Turner v. Treadway*, 53 N. Y., 650; *Carey v. White*, 52 N. Y., 188; *Weaver v. Barden*, 49 N. Y., 286; *Lawrence v.*

Clark, 86 N. Y., 128; *Nixon v. Palmer*, 8 N. Y., 400; *Bristol v. Sprague*, 8 Wend., 423; *Rosa v. Brotherson*, 10 Wend., 85; *Root v. French*, 13 Wend., 570; *Morton v. Rogers*, 14 Wend., 576; *Beers v. Culver*, 1 Hill, 589; *American Exch. Bank v. Corliss*, 46 Barb., 19; *Traders' Bank v. Bradner*, 48 Barb., 379; *Cardwell v. Hicks*, 87 Barb., 458, 28 How., 281; *Tiffany v. Warren*, 37 Barb., 571, 24 How. Prac., 293; *Starin v. Kelly*, 36 N. Y., Superior Ct. Rep., 370; *McQuade v. Irwin*, 89 N. Y. Superior Ct. Rep., 396; *Philbrick v. Dallett*, 84 N. Y. Superior Ct. Rep., 370, 43 How., 419; *Penfield v. Dunbar*, 64 Barb., 239; *Bright v. Judson*, 47 Barb., 29; *Farrington v. Frankfort Bank*, 81 Barb., 183, 192, S. C., 24 Barb., 554; *Furniss v. Gilchrist*, 1 Sandf., 53; *Clark v. Ely*, 2 Sandf. Chy., 166; *Clark v. Gallagher*, 20 How. Prac., 808; *White v. Springfield Bank*, 1 Barb., 25; *Small v. Smith*, 1 Denio, 588; *Duncan v. Gorsche*, 8 Bosw., 243; *Cheesbrough v. Wright*, 41 Barb., 28; *Fisher v. Sharp*, 5 Daly, 214.

See *McWilliams v. Mason*, 2 Abb. Prac., N. S., 211, 11 Alb. Law Jour., 185; *Scott v. Betts*, Lalor's Sup., 363; *White v. Springfield Bank*, 3 Sandf., 222, questioned 8 Bosw., 512; *N. Y., etc., v. Smith, etc.*, 4 Duer, 262, questioned 8 Bosw., 512; *Purchase v. Matteson*, 8 Bosw., 318, questioned 8 Bosw., 512; see also S. C., 2 Rob., 71; *Gould v. Segre*, 5 Duer, 260; *Bank v. Gilliland*, 23 Wend., 311; *Bromley v. Walker*, 51 Barb., 208; *Grocenovich v. Citizens, etc.*, 26 Louisiana Ann., 15.

The maker may maintain a suit in equity and obtain an injunction to restrain a negotiation of the note: *Clark v. Gallagher*, 20 How. Prac., 808.

In the following states it is held that one who takes negotiable paper before due, in payment of a precedent debt, though not evidenced by negotiable paper, becomes a holder thereof for value.

Alabama: *Barney v. Earle*, 18 Ala., 106; *Pond v. Lockwood*, 3 Ala., 669.

Arkansas: *Bertrand v. Barkman*, 13 Ark., 150; see *Johnson v. Graves*, 27 Ark., 560; *Levoens v. Planters, etc.*, 6 Ark., 761.

Connecticut: *McCasky v. Sherman*, 24 Conn., 605; *Brush v. Scribner*, 11 Conn., 388.

1875

Currié v. Misa.

Delaware: *Bush v. Peckard*, 3 Harrington, 385.

Georgia: *Bond v. Central Bank*, 2 Georgia, 92.

Illinois: *Manning v. McClure*, 36 Illinois, 490; *Conkling v. Vail*, 31 Id., 166; *Foy v. Blackstone*, Id., 538; *Kranert v. Simon*, 65 Illinois, 344; *Butters v. Haughwout*, 42 Illinois, 18; *Russell v. Haddock*, 8 Illinois, 233.

Iowa, it seems: *Trustees v. Hill*, 12 Iowa, 462, 1 Am. Law Reg., N. S., 744, 752-3 note.

Kentucky: *May v. Quimby*, 3 Bush, 96; *Alexander v. Springfield, etc.*, 2 Metcalf, 534.

Louisiana: *Maillard v. Aillet*, 6 La. Ann., 93.

Maine: *Bramhall v. Beckett*, 31 Me., 205; *Norton v. Waite*, 20 Maine, 175; *Holmes v. Smyth*, 16 Maine, 177; *Lee v. Kimball*, 45 Maine, 172.

Maryland: *Cecil Bank v. Heald*, 25 Maryland, 562.

Massachusetts: *Blanchard v. Stevens*, 3 Cush., 162; *Ives v. Farmers' Bank*, 2 Allen, 236.

Michigan: *Othwile v. Porter*, 13 Mich., 533; *Bostrick v. Dodge*, 1 Douglas, 413.

See *Ingerson v. Starkweather*, Walker's Chy., 346.

Minnesota: *Stevenson v. Hyland*, 11 Minn., 193.

Missouri: *Boatmans, etc., v. Holland*, 38 Missouri, 49.

New Hampshire: *Williams v. Little*, 11 N. H., 66.

New Jersey: *Annom v. McMichel*, 36 N. J. Law, 92; *Allaire v. Hartshorne*, 21 N. J. Law, 665.

North Carolina: *Reddick v. Jones*, 6 Iredell Law, 107.

Ohio: *Carlisle v. Wishart*, 11 Ohio, 172.

See *Aurrings v. Anderson*, 8 Ohio, 526; *Messick v. Roxborough*, 1 Handy, 348.

Pennsylvania: *Struthers v. Kendall*, 41 Penn. St. R., 214.

Rhode Island: *Bank v. Carrington*, 5 R. I., 515; *Cobb v. Doyle*, 7 R. I., 550.

South Carolina: *Bank v. Bank*, 13 Richardson, 291.

Vermont: *Dixon v. Dixon*, 31 Vermont, 450; *Russell v. Splater*, 47 Vermont, 273; *Quinn v. Hard*, 43 Vermont, 375.

See *Kitteridge v. Batchelder*, 47 Vermont, 64.

Wisconsin: *Knox v. Clifford*, 38 Wisc., 651; *Stevens v. Campbell*, 13 Wisc., 375; *Bangs v. Flint*, 25 Wisc., 544; *Fisher v. Otis*, 3 Chandel., 83; *Croft v. Buster*, 9 Wisc., 503; *Jenkins v. Schaub*, 14 Wisc., 1; *Andrews v. Hart*, 17 Wisc., 297; *Curtis v. Mohr*, 18 Wisc., 615.

See *Bond v. Wiltzie*, 12 Wisc., 611.

And by the federal courts: *Swift v. Tyson*, 16 Peters, 1; *Riley v. Anderson*, 2 McLean, 589.

The rule is otherwise in

Tennessee: *Ingram v. Vaden*, 3 Humph., 51; *Wormley v. Lowrey*, 1 Humph., 468; *King v. Doolittle*, 1 Head., 77; *Rhea v. Allison*, 3 Head., 176; *Brown v. Vanlier*, 7 Humph., 239; *Ingram v. Garrett*, 4 Humph., 66.

Otherwise if a note indorsed by a third person is given up: *Nicholl v. Bute*, 10 Yerger, 429.

A party who takes negotiable paper before due, as collateral security for an existing debt, is not a bona fide purchaser: *Manhattan Co. v. Reynolds*, 2 Hill, 140; *Am. Exch. Bank v. Corlies*, 46 Barb., 19; *Bright v. Judson*, 47 Barb., 29; *Prentiss v. Graves*, 33 Barb., 621; *Atlantic, etc., v. Franklin*, 55 N. Y., 235; *Coddington v. Bay*, 20 Johns., 367; *Dean v. Howell*, Lalor's Sup., 89; *Stalker v. McDonald*, 6 Hill, 93; *White v. Springfield Bank*, 1 Barb., 25; *Beeman v. Lovett*, 46 Cal., 387; *Ocean Bank v. Dill*, 39 Barb., 577; *New York, etc., v. De Wolf*, 3 Bosw., 86; see S. C., 5 Bosw., 593; *Wardell v. Howell*, 9 Wend., 170; *Traders' Bank v. Bradner*, 43 Barb., 393.

See *Bernhard v. Brunner*, 4 Bosw., 528.

Otherwise to secure one against indorsements: *Williams v. Smith*, 2 Hill, 301.

So if taken as collateral to a loan made at the time: *Bank v. Vanderherst*, 32 N. Y., 553, affirming 1 Rob., 211; *Moody v. Andrews*, 39 N. Y. Superior Court Rep., 302; *Muller v. Pinder*, 55 N. Y., 332.

Or a loan not yet due if the note therefor and collaterals be surrendered: *Park Bank v. Watson*, 42 N. Y., 490; *Ayrault v. McLaren*, 32 Barb., 305.

See *Stevens v. Corn Exchange*, 3 Hun, 147.

In the following states it has been held that one who takes negotiable paper before due as collateral security for an existing debt, is a *bona fide* purchaser:

California: *Payne v. Bensley*, 8 Cal., 260; *Robinson v. Smith*, 14 Cal., 94; *Naglee v. Lyman*, 14 Cal., 450.

Connecticut: *Bridgport Bank v. Welch*, 29 Conn., 475.

Georgia: *Gibson v. Conner*, 3 Geo., 47. **Illinois:** *Manning v. McClure*, 36 Ills., 490.

See *Easter v. Minard*, 26 Ills., 494.

Louisiana: *Citizens' Bank v. Gilman*, 18 La. Ann., 222.

Massachusetts: *Williams v. Cheney*, 8 Gray, 215; *Drinkhouse v. Sureth*, 1 Allen, 443, note; but see *Roche v. Ladd*, 1 Allen, 436.

Missouri: *Grant v. Kidwell*, 30 Missouri, 455.

In the following it is held he is not:

Alabama: *Fenouille v. Hamilton*, 35 Ala., 319.

Arkansas: *Bertrand v. Burkman*, 13 Ark., 150.

Iowa: *Ryan v. Chew*, 13 Iowa, 589; *Ruddick v. Chew*, 15 Iowa, 441; *Davis v. Strohm*, 17 Iowa, 421.

Maine: *Bramhall v. Beckett*, 31 Maine, 205; *Nutter v. Storrs*, 48 Maine, 163.

Massachusetts: *Roche v. Ladd*, 1 Allen, 436; but see *Williams v. Cheney*, 8 Gray, 215.

New Hampshire: *Jenness v. Bean*, 10 N. H., 266; *Williams v. Little*, 11 N. H., 66; *Fletcher v. Chase*, 16 N. H., 38; *Rice v. Raitt*, 17 N. H., 116.

North Carolina: *Harris v. Horner*, 1 Dev. & Battel's Eq., 455.

Pennsylvania: *Bronson v. Silverman*, 77 Penn. St. Rep., 94.

Tennessee: *Vatterben v. Howell*, 5 Sneed, 441.

Virginia: *Prentice v. Zane*, 2 Gratt., 262; *Davis v. Miller*, 14 Gratt., 1.

Wisconsin: *Bowman v. Van Kuren*, 29 Wis., 209; *Jenkins v. Schaub*, 14 Wisc., 1; *Cook v. Holms*, 5 Wisc., 107; *Lyon v. Ewings*, 17 Wisc., 61.

See *Bond v. Wiltzie*, 12 Wisc., 611; *Curtis v. Mohr*, 18 Wisc., 616; *Kinney v. Kruse*, 28 Wisc., 183.

But if such a holder transfers negotiable paper to a *bona fide* holder the latter acquires a good title thereto as such: *Merchants' Bank v. Comstock*,

55 N. Y., 24; *Just v. National Bank*, 56 N. Y., 478.

So if the purchaser of stocks or negotiable paper not due, give his own negotiable paper or promise to pay therefor, he does not thereby become a *bona fide* holder: *Weaver v. Burden*, 49 N. Y., 286; *Stevens v. Corn Exch. Bank*, 3 Hun, 147; *Kitteridge v. Chapman*, 36 Iowa, 348.

Otherwise if such negotiable paper have been transferred to a *bona fide* holder: *Williams v. Smith*, 2 Hill, 301.

See *Kitteridge v. Chapman*, 36 Iowa, 348.

One who purchases a note not yet due, knowing it is being diverted from the purpose for which it was made, cannot recover though he pay the face thereof: *Hooker v. Hubbard*, 97 Mass., 175.

A bank which receives paper from another bank for collection, collects it and passes it to the credit of the corresponding bank, cannot retain the proceeds as against the owner of such paper, even though the account between the two banks be equal and the collecting bank have subsequently paid drafts of the bank so sending the paper, and charged such payment to the corresponding bank and refrained from drawing for balances: *McBride v. Farmers' Bank*, 26 N. Y., 450; *Commercial Bank v. Marine Bank*, 1 Abb. Court App. Dec., 405, 3 Keyes, 337, 6 Abb. Prac., N. S., 83, 37 How. Prac., 432; *Dickerson v. Wason*, 47 N. Y., 439; *Scott v. Ocean Bank*, 23 N. Y., 289, affirming 5 Bosw., 192; *Warner v. Lee*, 6 N. Y., 144; *Hoffman v. Miller*, 9 Bosw., 334; *Am. Exch. Bank v. Corliss*, 46 Barb., 19.

See, however, *Bank v. Bank*, 1 How. U. S., 234.

Unless by express contract or well established course of dealing the bank sending the paper for collection became responsible for the collection of the paper, and cannot seek reimbursement for advances in case of non-payment: *Dickerson v. Wason*, 47 N. Y., 439.

One to whom property has been delivered by the fraudulent vendee in payment of a precedent debt or in performance of an executory contract of sale made prior to the acquiring possession thereof, or of some evidence of

1875

Currie v. Misa.

title thereto by the latter, although a consideration was paid at the time of the contract is not a *bona fide* purchaser for value and cannot hold the property as against a vendor who has been induced to part with his property by the fraud of his vendee: *Barnard v. Campbell*, 58 N. Y., 73, overruling *Fenby v. Pritchard*, 2 Sandf., 151, disapproving *Lee v. Kimball*, 45 Maine, 172, and *Butters v. Haughwout*, 42 Ills., 18, and distinguishing *Winne v. McDonald*, 39 N. Y., 235.

If a note be transferred as security for an usurious or illegal loan the transferee does not become a *bona fide* holder: *Fish v. De Wolf*, 4 Bosw., 573; *Dean v. Howell*, Lalor's Sup., 89.

See *Belmont, etc. v. Hoge*, 35 N. Y. 65.

A parol agreement that a mortgage on land, in terms securing \$200 shall stand as security for a further advance, is void even though the bond be altered and enlarged so as to include such sum: *Stoddard v. Hart*, 23 N. Y., 556.

Though equity may enforce specific performance of an agreement to give a mortgage (*Stoddard v. Hurt*, 23 N. Y., 556; *Hale v. Omaha, etc.*, 49 N. Y., 627; *Thornton v. St. Paul, etc.*, 45 How. Prac., 416; *Cole v. Cole*, 41 Maryland, 301; *Irwin v. Hubbard*, 49 Indiana, 350; *Sillers v. Lester*, 48 Mississippi, 518), it will not give an executed agreement of the parties contemplating no further act by either any different effect than that which the law attributes; nor will it reform the writing to make any different effect from that which the parties originally entered

into: *Stoddard v. Hart*, 23 N. Y., 556.

But if the mortgage were sufficiently large to secure subsequent advances, and be made to secure them, they would be covered thereby: *Fassett v. Smith*, 23 N. Y., 252.

As to what amounts to a parting with value at the time of the purchase of commercial paper, see *Stevens v. Corn Exchange Bank*, 3 Hun, 147, 48 How. Prac., 351; *Orandall v. Vickery*, 45 Barb., 156; *Taft v. Chapman*, 50 N. Y., 445; *Belmont, etc., v. Hoge*, 35 N. Y., 65; *Lawrence v. Clark*, 36 N. Y., 130; *Webster v. Van Steenburgh*, 46 Barb., 211; *Mody v. Andrews*, 39 N. Y. Superior Court Rep., 302; *Farmers' Bank v. Maxwell*, 32 N. Y., 579.

As to what does not, see *Orandall v. Vickery*, 45 Barb., 156; *Stevens v. Corn Exchange Bank*, 3 Hun, 147, 48 How. Prac., 351; *Van Valkenburgh v. Stupplebeen*, 49 Barb., 99; *Weaver v. Burden*, 49 N. Y., 286; *Hoyt v. Hoyt*, 8 Bosw., 512; *Farrington v. Frankfort Bank*, 31 Barb., 183; *Jewett v. Palmer*, 7 Johns. Chy., 65; *Harris v. Norton*, 16 Barb., 264; *Palmer v. Williams*, 24 Mich., 328; *Taft v. Chapman*, 50 N. Y., 445; *Pickett v. Barron*, 29 Barb., 505; *Russell v. Scudder*, 42 Barb., 31; *Lawrence v. Clark*, 36 N. Y., 130; *Webster v. Van Steenburgh*, 46 Barb., 211; *Snow v. Fourth Nat. Bank, etc.*, 7 Rob., 480; *Kitteridge v. Chapman*, 36 Iowa, 348; *Justh v. Nat., etc.*, 56 N. Y., 478; *Muller v. Pondir*, 55 N. Y., 325; *Lee v. Swift*, 1 Denio, 565; *Wood v. Hunt*, 38 Barb., 302.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXXVIII VICTORIA.

[Law Reports, 10 Exchequer, 183.]

May 8, 1875.

***THE GUARDIANS OF HALIFAX UNION V. WHEEL- [183
WRIGHT.**

Treasurer to Guardians—Banker and Customer—15 & 16 Vict. c. 59, s. 19—Forged Indorsement—Negligence in drawing Checks.

The defendant, the salaried manager of a bank, was appointed treasurer to guardians of the poor under the Poor Law Consolidated Order. A treasurer's account between him and the guardians was duly kept according to the Poor Law Orders; moneys were from time to time paid into the bank of which he was manager to the account of the guardians, and orders signed by the guardians in conformity with the orders were cashed like checks payable to order. The defendant received no salary or remuneration, and the guardians received interest on their balance when it exceeded £3,000.

A person in the service of the clerk to the guardians, who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces; and after signature of the orders he increased the amounts accordingly. He also forged indorsements to orders so increased in amount, and to others not so increased, and obtained payment of them at the bank.

On a case stated by an arbitrator in an action brought by the guardians against the defendant for the amount of the orders so paid, it was found as a fact that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the plaintiffs and their clerk in signing the orders fraudulently prepared for their signature:

Held, first, that the negligent drawing of the orders disentitled the plaintiffs to complain of the payment of the excess;

Secondly, that as to the payment on forged indorsements the account at the bank was in effect the plaintiffs' account; that the bank was protected by 16 & 17 Vict. c. 59, s. 19; and that as by the act and direction of the plaintiffs the only receipt of moneys on their behalf was a receipt by the bank, the defendant was not chargea-

1875

Halifax Union v. Wheelwright.

ble in any other way than as the bank was chargeable; and further, that if the account at the bank were regarded as the defendant's account, still being so kept by the order of the plaintiffs, they could not make any claim against him which he could not enforce against the bank.

SPECIAL CASE stated by an arbitrator.

The defendant was the treasurer to the plaintiffs, appointed 184] *under the Poor Law Consolidated Order of the 24th of July, 1847 (*).

The defendant was the salaried manager of the Halifax Commercial Banking Company, Limited, and was appointed treasurer because it was considered desirable by the guardians that the treasurer should be a bank manager. No express remuneration or salary was assigned to him as treasurer, nor did he receive any profit from the use of the money left in his hands (*).

When the defendant was first appointed treasurer the plaintiffs' accounts were kept in a common pass-book headed "Guardians of Halifax Poor Law Union in account with the Halifax Commercial Banking Company, Limited." The account was afterwards kept in a treasurer's book, according to the form prescribed by the Poor Law Orders (*), but no change was made in the bank ledger.

The sums deposited by the plaintiffs were dealt with by the bank in every respect in the same manner as funds de-

(*) By Arts. 153, 154, the guardians are to appoint a treasurer, who is to perform the duties imposed on him by the orders.

By Art. 203, the duties of the treasurer are (*inter alia*) "1. To receive all moneys tendered to be paid to the guardians, and to place the same to their credit; 2. To pay out of any moneys for the time being in his hands belonging to the guardians all orders for money which shall be drawn upon him in conformity with Art. 84, when the same shall be presented at the house or usual place of business of the treasurer, and within the usual hours of business; 3. To keep an account, under the proper dates, of all moneys received and paid by him as such treasurer, to balance the same at Lady Day and Michaelmas in every year, and to render an account of such moneys to the guardians when required by them to do so." By Art. 204 the regulations of Art. 203 are not to be applicable to cases in which the Governor and Company of the Bank of England may act as treasurer of the union or bankers to the guardians.

By Art. 84, "the guardians shall pay every sum greater than £5 by an order, which shall be drawn upon the treasurer of the union, and shall be signed by the presiding chairman and two other guardians at a meeting, and shall be countersigned by the clerk;" the form of the order is fixed by Art. 1 of the General Order of April, 1857.

By the General Order for Accounts (14th of January, 1867), Art. 18, "The treasurer shall keep punctually and accurately a book according to the form set forth in sched. D., hereunto annexed, in which shall be entered an account of all moneys received and paid by him on account of the guardians," which he is to balance quarterly, and lay before the guardians once a month.

(*) By Art. 174 of the Consolidated Order, 1847, "If no remuneration or salary be expressly assigned to the treasurer, the profit arising from the use of money from time to time left in his hands shall be deemed to be the payment of his services."

posited with them *by other customers. It was understood that when the balance to the credit of the guardians exceeded £3,000 interest in respect of it should be allowed by the bank; and during the period when the transactions in question took place the guardians were on several occasions credited with sums of money as interest, which were entered in the treasurer's book as payments to their credit by the bank. [185

The course of business between the plaintiffs and the defendant was, that sums of money were from time to time paid to the account of the plaintiffs across the counter to the bank clerks, and the orders signed on behalf of the plaintiffs were cashed like checks payable to order.

The orders were drawn upon the defendant, and were signed and countersigned in conformity with Art. 84 of the Poor Law Orders⁽¹⁾, and were upon forms, the material parts of which were as follows: "Pay to , or order, the sum of pounds, shillings, and pence, and charge the same to the account of the said guardians," with a place for the figures in the left-hand corner, as in an ordinary check.

Barstow, the clerk to the plaintiffs, had in his employment a clerk named Laidler, whose duty it was to fill up the orders. Laidler drew a large number of orders in such a way, that after they had been duly signed and countersigned, the amounts could be increased; and he did accordingly increase the amounts, sometimes by adding the syllable "teen" after the written number of pounds, and sometimes by inserting the words "twenty," "thirty," &c., before the written number, and by altering in a corresponding way the figures denoting the amounts. Orders so increased, but in all other respects genuine, were presented and paid at the bank in the ordinary way; and it was found as a fact by the arbitrator, that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk in signing the orders fraudulently prepared by Laidler for their signature.

It did not appear how the indorsements were obtained in these cases, but it was stated as probable that the amounts were increased after the indorsement of the orders.

*In other cases, however, Laidler forged the indorsements to orders not so altered, and obtained payment of them to the amount of £287 9s. 5d. [186

In other cases, again, he both forged the indorsements and

(1) See *ante*, p. 184, n. (1).

1875

Halifax Union v. Wheelwright.

also increased the amounts, and obtained payments to the amount of £273 12s. 4d., being £191 in excess of the amount for which the orders were drawn; being enabled in every case to make the fraudulent increase by a want of caution on the part of the guardians as above described.

The guardians brought an action against Barstow for negligence, and in their particulars claimed £3,681 17s. 5d., which included all the orders contained in the particulars in the present action; and that action was compromised by an agreement, by which proceedings were to be stayed "on payment to the plaintiffs of the sum of £2,320 4s. 6d., the amount of certain of the orders or checks enumerated in the particulars of the plaintiffs' demand," to be paid by instalments as therein mentioned, "this sum to be accepted in full discharge of all claims, demands, and liabilities in this action, or otherwise against the defendant as clerk to the "board;" the plaintiffs engaging to assist Barstow in any proceedings to recover any money from Laidler, or his estate, or in prosecuting him, on being indemnified by Barstow.

In their particulars in the present action the plaintiffs gave credit to the defendant for £1,302, being the amount of thirty-five orders which had been made payable to Barstow, considering that they were morally, though not legally, barred of their claim against the defendant in respect of these orders by their compromise with Barstow; and they claimed against the defendant the balance of £2,379 9s. 5d. in respect of orders, some of which had been increased, some indorsed, and some both increased and indorsed by Laidler, as above stated.

The questions for the opinion of the court were: (1). Did the settlement with Barstow prevent the plaintiffs from recovering against the defendant in this action? If not (2). Were the plaintiffs entitled to recover from the defendant any and which of the sums of £287 9s. 5d. (the amount of the unaltered checks with forged indorsements), £273 12s. 4d. (the amount of the orders with the amounts increased and the 187] indorsements forged), or *£82 12s. 4d. (the original amount of the last-mentioned orders), or £191 (the amount of the increase in the same orders)?

Jan. 20, 21. *Field*, Q.C. (*Gibbons* with him), for the plaintiffs: First, as to the defence of the whole action, the settlement with Barstow is no answer. The duties of Barstow and the defendant were entirely distinct and independent, and there is nothing resembling a joint tort. Therefore the rule laid down in *Brinsmead v. Harrison* (1) has no

(1) Law Rep., 7 C. P., 547.

application. Secondly, as to both the sums of £287 9s. 5d. and £273 12s. 4d., paid on forged indorsements, the defendant is not within the protection of 16 & 17 Vict. c. 59, s. 19⁽¹⁾, which is an enactment in favor of bankers only: *Ogden v. Benas*⁽²⁾. The plaintiffs are persons acting under limited statutory powers, and with a statutory duty to appoint a treasurer. Their relation to the defendant is determined by the Poor Law Orders, which show it to be rather that of master and servant, or principal and agent, than that of banker and customer. The intention of the orders seems to be that the guardians shall not have a banking account themselves, but that some one person, to be named and appointed by them, shall be personally answerable to them for all moneys received by them or on their account. And, in fact, the plaintiffs had no banking account; they had no pass-book, but their accounts were kept in the treasurer's book as provided by the orders⁽³⁾. The only banking account was the defendant's, and the plaintiffs' orders were not on the bank to pay, but on the defendant at the bank to pay; he might have kept his account at any bank. The mode in which the bank kept the account in their own ledger cannot affect the plaintiffs. Thirdly, assuming that the defendant is protected by 16 & 17 Vict. c. 59, s. 19, yet as to the sum of £191, the amount by which some of the orders paid on *forged indorsements were increased, the de- [188 fendant cannot discharge himself. He can only discharge himself by showing that he has paid moneys by the authority of the plaintiffs. This is clearly laid down in *Scholey v. Ramsbottom*⁽⁴⁾ and *Hall v. Fuller*⁽⁵⁾. The defendant relies upon *Young v. Grote*⁽⁶⁾, but the grounds of decision in that case are uncertain, and the present case is not within it. Parke, B., in *Roberts v. Tucker*⁽⁷⁾, puts it on the ground of the plaintiff having, "by signing a blank check, given authority to any person in whose hands it was to fill up the check in whatever way the blank permitted." Blackburn, J., in *Swan v. North British Australasian Co.*⁽⁸⁾, puts it

(1) 16 & 17 Vict. c. 59, s. 19: "Any draft or order drawn upon a banker for a sum of money payable to order or demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to the banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on the banker to prove that such indorsement, or any subsequent indorsement, was made by and under the direction or authority of the person to whom the draft or order was or is made payable, either by the drawer or any indorsee thereof."

(2) Law Rep., 9 C. P., 513.

(3) See *ante*, p. 184, n. (1).

(4) 2 Camp., 485.

(5) 5 B. & C., 750.

(6) 4 Bing., 253.

(7) 16 Q. B., 560, at p. 580; 20 L. J. (Q.B.), 270.

(8) 2 H. & C., 175, at p. 183; 32 L. J. (Ex.), 273.

and under the direction or authority of

1875

Halifax Union v. Wheelwright.

on the ground that "a person putting in circulation a bill of exchange, does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it;" and in the same case (') Cockburn, C.J., treats it as founded on the principle of avoiding circuity of action. In *Evans' Trustees v. Bank of Ireland* (') Parke, B., in delivering the opinions of the judges, and Lord Cranworth, put it on the ground of estoppel. In a manuscript note appended to the latter case (') Pollock, C.B., says: "Whatever doubt may seem to be thrown upon the case of *Young v. Grote* (') and *Coles v. Bank of England* ('), as to the result in each case, no doubt whatever is thrown upon the principles on which those cases were avowedly decided. This case is an authority for the correctness of those principles, though it professes to doubt the propriety of their application." But, in fact, the difficulty is to know what principle is affirmed by *Young v. Grote* ('). The most probable ground is estoppel by negligence; but *Evans' Trustees v. Bank of Ireland* (') and *Swan v. North British Australasian Co.* (') are authorities that such an estoppel can only arise from some act inducing or inviting fraud; mere want of caution is not enough, for [189] no man is called on to anticipate the commission *of a fraudulent act so as to be bound by not excluding its possibility. No such act of negligence is established against the plaintiffs here; it is only found that the defendant was misled by their "want of caution," and that finding must be interpreted, and its effect determined, by the facts of the case.

Wills, Q.C. (*Mellor* with him,) for the defendant: First, as to the increased amounts, the case of *Young v. Grote* (') has never been overruled, although the precise principle on which it was decided has been made matter of question. No doubt is thrown upon it in *Evans' Trustees v. Bank of Ireland* ('), and its authority is expressly recognized in *Ex parte Swan* (') and in *Orr v. Union Bank of Scotland* ('), where Lord Cranworth says: "The principle is a sound one, that where the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine." To use the

(1) 2 H. & C., at p. 190; 32 L. J. (Ex.), 273.

(2) 5 H. L. C., 389, at pp. 410, 413.

(3) In the exchequer copy of 5 H. L. C., at p. 415.

(4) 4 Bing., 253.

(5) 10 A. & E., 437.

(6) 2 H. & C., 175, at p. 183; 32 L. J. (Ex.), 273.

(7) 5 H. L. C., 389.

(8) 7 C. B. (N.S.), 400, at p. 445; 30 L. J. (C.P.), 113.

(9) 1 Macq. 513, at p. 522.

language of Lord Cranworth in the same case, the question is, whether the payment is not a payment which the defendant is "entitled to consider as valid between him and the plaintiff;" and that depends on whether the bank clerks were not induced to pay this money through the plaintiffs' negligence. On this point the case is express, that the payment was due solely to the clerks being misled by the plaintiffs' want of proper caution, which excludes any negligence on their own part, or on the part of the defendant. All the conditions, therefore, required by Blackburn, J., in *Swan v. North British Australasian Co.* ⁽¹⁾ are present; the negligence was in the transaction, it was neglect of a duty owing to the defendant, and it was the direct and proximate, and the sole cause of the excessive payment. If, then, the negligence of the plaintiffs has induced the bank to part with money on their account, apparently with their authority, and upon an instrument in which the genuine part was in the same hand with, and undistinguishable from, the fraudulent addition, then, to avoid circuity of action, as was put by Cockburn, C.J., in the last-mentioned case, they cannot recover from the defendant a sum which on those grounds they *would be liable to repay. Secondly, [190 as to the forged indorsements, the defendant is protected by 16 & 17 Vict. c. 59, s. 19, which was meant to include all persons acting as bankers. This appears from the earlier act of 55 Geo. 3, c. 184, the schedule to which exempted from duty "all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker." That act was repealed by 16 & 17 Vict. c. 59, and the exemption in the schedule is of "all drafts or orders for the payment of money to the bearer on demand, drawn upon any banker or bankers, now by law exempt from stamp duty." The exemption is meant to be as wide as that under 55 Geo. 3, c. 184, although the words "or any person or persons acting as a banker" are omitted; and that this is so is confirmed by the subsequent act of 17 & 18 Vict. c. 53, s. 7, which, in reciting the exemption, restores the omitted words. It may be concluded, therefore, that the intention was equally extensive in s. 19, and the words are sufficiently general to allow of a construction which will give that intention effect. Further, this account was in effect the plaintiffs' account with the bank, kept at the bank by their direction and on which they, and not the defendant, received in trust. They cannot therefore claim against the

(1) 2 H. & C., at p. 182; 32 L. J. (Ex.), 273.

1875 .

Halifax Union v. Wheelwright.

defendant what he could not claim against the bank. Thirdly, assuming the defendant to be otherwise liable, the settlement with Barstow is an answer. Without Barstow's negligence the act complained of, that is the unauthorized payment, would not have been done. It is a joint act of negligence, and the principle of *Brinsmead v. Harrison* (*) applies.

Gibbons, in reply, referred to *Reg. v. Braintree Union* (') and *Pott v. Clegg* (').

Cur. ado. vult.

May 8. The judgment of the court (Cleasby, Pollock (*), and Amphlett, BB.) was delivered by

CLEASBY, B. : In this case, which was argued before my 191] Brothers *Pollock and Amphlett and myself, the question is whether the defendant, who was the treasurer of the plaintiffs, is liable to them for moneys received and not accounted for. The facts appear upon the special case, and it is unnecessary to recapitulate them.

The question arises upon two items; that is, as was agreed by the learned counsel, it is reduced to two items. The two items are: First, £273 12s. 4d. (composed of two amounts, £191 and £82 12s. 4d.); second, £287 9s. 5d.

The question upon the first item is, whether the defendant can claim the credit of payments made by him upon orders which had been signed by the plaintiffs, but had become forgeries by the amounts being increased. Under ordinary circumstances he could not claim the benefit of those payments; but it was said the forgeries were attributable to the negligent and improper manner in which the drafts were drawn. The alleged negligence was by leaving blanks in the drafts which admitted of the insertion of increased amounts by the person who wrote them, and who committed the forgeries. Since they were signed by or on behalf of the plaintiffs in the improper form in which they had been drawn, the case is the same as if they had been drawn in their improper form, and the plaintiffs cannot, we think, avail themselves of the fact that the drafts were not drawn by themselves, but by some person in the office of their clerk.

We have upon the consequences of the negligent drawing of the plaintiffs the following statement: "The orders thus fraudulently increased in amount, but genuine in all other respects, were presented and paid at the bank in the ordinary way, and I find that the payment by the treasurer's

(*) Law Rep., 7 C. P., 547.

(*) 1 Q. B., 180.

(*) 16 M. & W., 321.

(*) Pollock, B., doubted as to the second item, but as the question depended on inference from facts, did not dissent.

clerks of the excess in these instances was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk, in signing the orders fraudulently prepared by Laidler for their signature." The question, therefore, which arises upon this item is, whether the negligent drawing of the drafts disentitles them to complain of the cashing those drafts. Upon this question we had before us the principal case of *Young v. Grote* ⁽¹⁾, followed by several other cases, among others *Robarts v. Tucker* ⁽²⁾, and *Swan v. North British Australasian* [192 Co.] ⁽³⁾. We think the position taken by the defendant is made good by those authorities. It is true that there is some difference of opinion as to the proper legal ground for the conclusion, and perhaps some difficulty in determining which is the soundest. It is put on the ground of the negligence itself disentitling the party guilty of it in the first cited case, where the fault is said to be all on one side, and where the conclusion is justified in the judgment of Best, C.J., by an apposite quotation from Pothier. In the case of *Robarts v. Tucker* ⁽²⁾, upon error from the Queen's Bench, Baron Parke, in no way impeaching the judgment in *Young v. Grote*, considered that it was founded on this, that the person who negligently drew the check "as it were gave authority to the party to fill up the check in the way it was filled up."

In the last cited case (*Swan v. North British Australasian Co.*) ⁽³⁾ the present Lord Chief Justice of the Queen's Bench preferred putting the conclusion upon the ground of avoiding circuity of action, which is certainly the most exact ground, and agrees with what is said by Pothier in the passage referred to. But these various reasons for the conclusion only show how incontestable the conclusion itself is; and it is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular county, but which we cannot help giving effect to in the administration of justice, viz., that a man cannot take advantage of his own wrong, a man cannot complain of the consequence of his own default, against a person who was misled by that default without any fault of his own. So far, therefore, as regards this item of £273 12s. 4d., we think the plaintiffs cannot recover.

As to the other item of £287 9s. 5d., the question raised is one of some difficulty, and we thought proper to take time to consider of it. This item may be taken to be the amount

⁽¹⁾ 4 Bing., 253.

⁽²⁾ 16 Q. B., 560; 20 L. J. (Q.B.), 270.

⁽³⁾ 2 H. & C., 175; 32 L. J. (Ex.), 273.

⁽⁴⁾ 16 Q. B., 560; 20 L. J. (Q.B.), 270.

1875

Halifax Union v. Wheelwright.

of orders which were paid upon forged indorsements, and the negligent drawing of orders does not apply to it at all.

The question raised is, whether, under the circumstances [193] of the *case, the defendant can claim the protection given to bankers by the statute 16 & 17 Vict. c. 59, s. 19. Previous to that statute, if a banker paid a check, with a forged indorsement upon it he could not charge it against his customer; but the effect of that statute was to enable him to do so.

Two arguments were addressed to us upon this part of the case. First, it was said that, taking that statute together with several other statutes on the same subject, the word "bankers" was not to be restricted to persons regularly engaged in the business of banking, but that any person who receives the money of another into his charge, and, according to the course of business between them, pays it out by having drafts drawn upon him payable to order, ought to be considered a banker within that enactment. We cannot accede to that argument. We think the Legislature had reference to a particular class, viz., persons carrying on the business of bankers, and conferred upon them a great privilege. Such a privilege can only be claimed by the clearest language. A confidence might be well placed in the integrity and character of some persons, which would not belong to *any* person intrusted with money.

The other ground taken deserves more consideration. It was contended that all the facts of the case taken together showed that the account of the guardians ought to be regarded as a banker's account kept by them with the Halifax Bank. The manner in which the orders were drawn, not being drawn upon the bank, but the treasurer, who was manager of the bank, was relied upon, and no doubt with some reason, to show that there was not a banking account between the guardians and the bank. And if there was no other evidence on this part of the case, it would be conclusive.

But it appears that the course of business was for money to be paid to the credit of the plaintiffs across the counter. It further appears that for some time the plaintiffs' account was kept in a pass-book in the usual manner, and that afterwards it was kept in a treasurer's book in the prescribed form. It seems clear that, until the change, the bankers were the bankers of the plaintiffs; and, though the statement is not so full as it might have been, the change was not for the purpose of altering the relation between [194] *the plaintiffs and the bank, but to comply with the

rules as regards the treasurer. And this conclusion is fully warranted by the statement, from which it appears that unquestionably in point of fact the guardians had for their own benefit an account of some sort with the bank, and the money was by consent of both parties regarded as theirs, and the plaintiffs received considerable sums of money from the bank as interest for their money. It was, therefore, a banker's account.

But it was forcibly argued that, according to the poor-law regulations, this could not be. The guardians are to pay to the treasurer, and the treasurer ought to have had his own account with the bankers. The answer to this seems to be that the guardians chose to make use of a manager as treasurer, and in that way have the benefit of an account with the bank. We must, upon the question before us, deal with the facts as they are, not as they ought to have been.

It follows that the plaintiffs having chosen to keep and have the benefit of a banker's account, must take it with its incidents, and one of those is, that the payment of a genuine check with a forged indorsement is a discharge.

It may be said that, though the bankers are discharged as against the plaintiffs, still the treasurer is not discharged, because he has bound himself to account for what he receives. But the proper answer to this seems to be, that there was, in consequence of the manner in which the plaintiffs, who were the masters, chose to have the account kept, no receipt except by the bankers, and the defendant could not help himself; he can only, therefore, be regarded as receiving subject to the consequences of the manner of receiving.

It may also further be said, that if the account must be regarded as the account of the treasurer with the bank, still it was an account kept by him with this bank by the order of the plaintiffs, and they ought not, therefore, to make a claim which he could not have enforced against the bank.

The case is one of difficulty, in consequence of the parties having departed from the proper course; but we think the proper conclusion is, that as the only receipt by the defendant was the receipt by the bankers, under the circumstances stated in the *case, he cannot properly be held [195 liable when they, without any act or default on his part, are discharged.

Judgment for the defendant.

Attorneys for plaintiffs: *Le Riche & Son.*

Attorneys for defendant: *Jacobs, North & Vincent.*

If one deliver a check to a servant for collection, and carelessly leave blanks which the servant fills up for a larger amount, so that the banker has no means of detecting the forgery, the drawer must sustain the loss. His negligence in leaving the blanks contributed to the injury, and the servant was empowered to obtain the money from the bank. The principal will be held responsible for the manner in which he does it: *Young v. Grote*, 4 Bing., 253, 13 Eng. C. L. Rep.; *Morrison v. Buchanan*, 6 C. & P., 18, 25 Eng. C. L. Rep.; *Gerrard v. Hadden*, 67 Penn. St. Rep., 82, 5 Am. Rep., 412.

But see *Bristol, etc., v. First, etc.*, 41 Conn., 421.

So if one sign a note containing a material qualification written in pencil which is erased: *Harvey v. Smith*, 55 Illinois, 224.

Where a banker indorses for the benefit of a customer, two parts of a bill, both being stamped and with the words "eight days" sufficiently far apart for the insertion after indorsement of the letter "y," such parts do not constitute two bills; there is no negligence such as to disentitle him from setting up the alteration as a defence to an action on the bill; nor is he estopped from taking advantage of a fraudulent sale by the customer of the two parts as separate bills: *Société-Generale v. Metropolitan Bank*, 21 Weekly Reporter, 335, C. P.

It may be stated as a general rule that if one who can read signs negotiable commercial paper, without reading it, and delivers it to another in consequence of a misrepresentation by such other as to its character, such fraud or misrepresentation is no defence to such paper in the hands of a *bona fide* holder. The maker is guilty of negligence in not reading and ascertaining the character of the paper, and should suffer rather than innocent persons injured by an instrument which he permitted to be sent out to the world. To avoid liability he must show he was guilty of no laches or negligence in signing: *Chapman v. Rose*, 56 N. Y., 137, S. C., 1 Cent. Law Jour., 242, 47 How. Prac., 13, reversing 44 How. Prac., 364; *Leash v. Nichols*, 55 Illinois, 273; *Douglas v. Malting*, 29 Iowa, 498, 4 Am. Rep., 238; *Wright v. Flynn*, 33

Iowa, 159; *Seeright v. Fletcher*, 6 Blackford's Ind., 380; *Fenton v. Robinson*, 6 N. Y. Supreme Court Rep., 427, 4 Hun., 252; *Nebeker v. Cutsenger*, 48 Ind., 436; *Sims v. Bice*, 67 Ills., 88; *Ryan v. World, etc.*, 41 Conn., 168; *Gleem v. Porter*, 49 Ind., 500; *Shirts v. Overjohn*, 60 Missouri, 305; *Frederick v. Clemens*, 60 Missouri, 313.

The holder must, however, be *bona fide*: *Waddell v. Jaynes*, 22 Upper Canada Com. Pl., 212.

And the paper must be *commercial paper*: *Boardman v. Gailaird*, 60 N. Y., 614.

As a general rule, unless one who signs an instrument is misled by fraud or misrepresentation into so doing he is bound to know and chargeable with a knowledge of the contents of the paper he executes, particularly where others have innocently and properly relied thereon: *Jackson v. Cory*, 12 Johns., 429; *Harris v. Story*, 2 E. D. Smith's Com. Pl., 367; *Clem v. New, etc.*, 19 Ind., 498; *Chase v. Hamilton, etc.*, 20 N. Y., 55; *Breese v. U. S., etc.*, 31 How. Pr., 86; *Schmidt v. Herfurth*, 5 Rob., 124; *Fowler v. Trull*, 1 Hun, 409; *Chapman v. Rose*, 56 N. Y., 137; *Collins v. Coghill*, 7 Rob., 91; *Ogilvie v. Knox, etc.*, 22 How. U. S., 380; *Upton v. Tribilock*, 8 Chicago Leg. News, 65; *Ryan v. World, etc.*, 41 Conn., 168; *Bank v. Church*, 29 Conn., 137; *Fawcett v. Currier*, 109 Mass., 79, S. C. on second appeal, 115 Mass., 20; *School, etc., v. Keeler*, 67 N. C., 443; *Hunter v. Walters*, L. R., 11 Eq., 292; *Michael v. Michael*, 4 Iredell's Eq., 349; *Stamps v. Bracy*, 2 Miss. (1 How.), 312; *Harris v. Delamar*, 3 Iredell's Eq., 218; *Citizens' Nat. Bank v. Smith*, 55 N. H., 593, 3 Central Law Jour., 163.

Otherwise as against the person *improperly* procuring the execution where the rights of no other person have intervened: *Downes v. Price*, L. R., 3 H. L., 343; *Directors, etc., v. Kisch*, L. R., 2 H. L., 89; *Oakes v. Turquand*, 2 id., 325; *Western Bank v. Addie*, L. R., 1 Scotch & Div. App., 145; *Mackay v. Commercial, etc.*, 9 Eng. Rep., 202; *Waterhouse v. Jameson*, L. R., 2 Scotch & Div. App., 29; *Kerr on Frauds* (1st Am. ed.), 386-7.

The cases of *Whitney v. Snyder* (3 Lans., 477), and *Poster v. McKennon* (L. R., 4 C. P., 704), were practically

overruled in *Chapman v. Rose* (56 N. Y., 187, 142).

The cases of *Corby v. Widdle*, 57 Missouri, 452, *Martin v. Snyder*, 55 Missouri, 577, ought not, upon principle, to be followed outside of the jurisdiction of the court by which they were pronounced.

A *bona fide* holder of a note as to the execution of which the maker was guilty of laches may in some instances recover thereon, although the person obtaining it might in consequence of fraud in its execution be punishable criminally: *Clay v. Schwab*, 1 Mich. N. P., 168; *Gibbs v. Linabury*, 2 id., 49, Appendix, reversed upon another point, 22 Mich., 479; *Abbott v. Rose*, 62 Maine, 201; *State v. Shurtliff*, 18 Me., 368.

Where one signs a paper with blanks to be filled by another, and intrusts it to such other, he is responsible upon it, although the blanks be filled in a manner different than he contemplated or authorized: *Abbott v. Rose*, 62 Maine, 194; *Redlich v. Doll*, 54 N. Y., 284.

In *Zimmerman v. Rote*, 75 Penn. St. R., 188, a negotiable note on a printed blank was signed after there was written on the margin that it was given for a patent and not to be paid till a profit specified was made. The condition was cut off and the note passed to a *bona*

fide indorsee for value without notice. The consideration failed: Held in a suit by the holder that this was no defence by the maker. The maker must guard the public from frauds and alterations by refusing to sign negotiable paper in such form as to admit of fraudulent practices with ease and without ready detection: *Zimmerman v. Rote*, 75 Penn. St. R., 188; *Phelan v. Moss*, 67 Penn. St. R., 59.

See, however, *Gerriah v. Glines*, 56 N. H., —, referred to 8 Cent. Law Jour., 158; *Bank v. Smith*, 55 N. H. 598.

In *Brown v. Reed*, 2 Weekly Notes of Cases, 230, the plaintiff after proving plaintiff's signature put in evidence a promissory note in the usual form for \$250, signed by the defendant Brown, to the order of one Smith and by him indorsed. The defendant offered to prove that the note had been altered without his knowledge or consent, and that the paper in suit was but a part of an agreement entered into between himself and Smith, purporting to constitute defendant an agent to sell hay and harvest grinders, and that the paper, since it was signed, had been cut in two, thus making it appear to be a genuine promissory note; that a large part of the original instrument was cut off, and that when he signed it, it was in the following form:

[PRINTED AGREEMENT OF AGENCY.]

"North East, April 3d, 1872.

Six months after date I promise to pay J. B. Smith or order TWO HUNDRED AND FIFTY Dollars for value received, with legal interest, without defalcation or stay of execution.

bearer Fifty dollars when I sell by worth of Hay and Harvest Grinders, appeal, and also without

T. H. BROWN, Agent for Hay & Harvest Grinders.

To this offer the plaintiff objected.

The court (Vincent, J.) excluded the testimony.

The defendant submitted points to the court, chiefly predicated upon assumptions of fact contained in his offer of proof, which points the court rejected, and thereupon charged the jury: "There is no evidence impeaching this paper as a note in the hands of the plaintiff, and your verdict must therefore be for the plaintiff."

Verdict and judgment for plaintiff, to which defendant took a writ of error, assigning as error, *inter alia*, the rejection of his offer of proof.

The court after reviewing *Phelan v. Moss*, 67 Penn. St. R., 59 *Garrard v.*

Hadden, 67 Penn. St. R., 82, and *Zimmerman v. Rote*, 75 Penn. St. R., 188, proceeded, "In all these cases the defendants put their names to what were on their faces promissory notes. In the case before us, on the defendant's offer he did not sign a promissory note but a contract by which he was to become an agent for the sale of a washing machine. It was, indeed, so cunningly framed that it might be cut in two parts, one of which, with the maker's name, would then be a perfect negotiable note. Whether there was negligence in the maker was clearly a question of fact for the jury. The line of demarcation between the two parts might have been so clear and distinct,

1875

Halifax Union v. Wheelwright.

and have given the instrument so unusual an appearance as ought to have arrested the attention of any prudent man. But it may have been otherwise. If there was no negligence in the maker, the good faith and absence of negligence on the part of the holder cannot avail him. The alteration was a forgery, and there was nothing to estop the maker from alleging and proving it. The ink of a writing may be extracted by a chemical process, so that it is impossible for any but an expert to detect it, but surely in such a case it cannot be pretended that the holder can rely upon his good faith and diligence. We think, then, that the evidence offered by the defendant below should have been received.

Judgment reversed, and a *venire facias de novo* awarded."

A party believing he is affixing his signature to paper A, but who, through a trick practised upon him, actually affixes it to paper B, a promissory note, negotiable in form, is liable to a *bona fide* holder thereof taking it without notice and in the usual course of trade. In a suit on a promissory note by holder against maker, the latter testified that he was requested to sign another paper, and that the note sued on must have been so slipped under it that his signature was actually affixed to the latter while he believed he was signing the former. The plaintiff was a *bona fide* holder, and took it for value without notice, in the due course of trade. Held (by an equally divided court), that the plaintiff was entitled to recover: *Broadbelt v. Huddleston*, 2 Weekly Notes of Cases, 293.

The Supreme Court of Wisconsin, *Butler v. Cairns*, 37 Wisconsin, 61, has just held it to be a question of fact, in such case, whether the maker was guilty of negligence, and we think the latter case the better law.

See also *Frederick v. Clemens*, 60 Missouri, 313.

But if when the instrument is signed it have a qualification therein in a part thereof which is torn off or effaced the maker is not bound by the instrument as so altered, for it is not the instrument he executed; so as to any material alteration of the instrument signed: *Benedict v. Conden*, 49 N. Y., 396; *Wait v. Pomeroy*, 20 Mich., 425, 4 Am. Rep., 395; *Kellogg v. Steiner*, 29 Wisc.,

626; *Cochran v. Nebeker*, 48 Ind., 459; *Gerrish v. Glines*, 56 N. H., —, referred to 3 Cent. Law Jour., 153; 7 Albany Law Jour., 159, 402; 3 Albany Law Jour., 8.

The case of *Elliott v. Levings*, 54 Illinois, 213, clearly is not sound law out of that state.

Even though the part torn off was below the signature: *Benedict v. Cowden*, 49 N. Y., 396; *Wait v. Pomeroy*, 20 Mich., 425, 4 Am. Rep., 395; *Cochran v. Nebeker*, 48 Ind., 459.

The case of *Nebeker v. Cochran*, 7 Chicago Leg. News, 318, 14 Am. Law Reg., N. S., 697, Fountain Circuit Court, Indiana, was reversed, 48 Ind., 459.

Where an instrument is signed by an illiterate person upon misrepresentations as to its contents it is *void ab initio* for he is guilty of no negligence in not reading it; otherwise where the contents are correctly stated, but on a misrepresentation as to facts *aliunde*: *Schuykill Co. v. Copley*, 67 Penn. St., 386, 10 Am. Law Reg., N. S., 783, 5 Am. Rep., 441; *Walker v. Ebert*, 29 Wisc., 194.

But see *Craig v. Hobbs*, 44 Ind., 363, where the maker did not ask to have the paper read to him.

The case of *Taylor v. Atchison*, 54 Illinois, 196, 5 Am. R., 118, may possibly be sustained upon this ground, but the soundness of the application of the rule upon the facts may well be questioned. In *Nebeker v. Cochran* it was sustained upon the ground of the fraudulent substitution of another agreement for that read by the maker.

See *Sims v. Bier*, 67 Illinois, 90.

There are a class of cases in which after reading the paper he was about to sign, the payee suddenly and fraudulently substituted another paper for it, where it was held the maker was not guilty of laches and not bound by the paper he did sign: *Briggs v. Ewart*, 51 Missouri, 245; *Gibbs v. Linabury*, 23 Mich., 479, reversing 2 Mich. N. P., 49, Appendix; *Byers v. Dougherty*, 40 Ind., 198, 202, pointing out the distinction between not reading any instrument and reading one but being imposed upon by the substitution of another; *Taylor v. Atchison*, 54 Illinois, 196, 199, as explained in *Nebeker v. Cutsinger*, 48 Ind., 448; *Frederick v. Clemens*, 60 Missouri, 313.

Where a party was prevented from reading the paper by the restiveness of his team, this was held a sufficient excuse for what would otherwise have been laches in failing to read it: *Sims v. Rice*, 67 Illinois, 88.

Where the maker of a promissory note was induced by the fraud and circumvention of the payee to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper, to enable the payee to see how his name was spelled or written, and the maker did not, after he discovered that he had so signed his name to the note, voluntarily deliver it to the payee, but it was taken possession of wrongfully and forcibly by the payee, and by him carried away against the consent of the maker and negotiated: Held that the maker was no more bound by his signature than if it were a total forgery, although the person to whom it was negotiated was a purchaser and holder in good faith and for a valuable consideration before maturity: *Cline v. Guthrie*, 42 Ind., 227; *Frederick v. Clemens*, 60 Missouri, 313.

Held, also, that admitting that the maker signed his name to the note, with full knowledge of its character, it was nevertheless invalid and void, even in the hands of an innocent pur-

chaser for value, for the want of delivery: nor was the maker liable on the ground that when one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it: *Cline v. Guthrie*, 42 Ind., 227; *Burson v. Huntington*, 21 Mich., 415, 4 Am. Rep., 397.

The case of *Clarke v. Johnson*, 54 Illinois, 298, ought not, upon principle, to be followed out of that state. It was disapproved in *Briggs v. Ewart*, 51 Missouri, 250.

An answer which alleges that there was no agreement or contract between the defendant and the payee by which a note was to be made, that no note was shown or read to the defendant, but alleging that there was a contract about other matters, which was signed by the defendant, and if the note in suit was contained in the paper signed it was so disguised and concealed that the defendant could not with reasonable diligence have discovered the same; that he never gave the note, and if his signature to it is genuine, it was obtained without his knowledge or consent, by fraudulent means to him unknown, and which he could not with reasonable diligence have discovered, states a good defence and is not demurrable: *Detweiler v. Bash*, 44 Ind., 70.

[Law Reports, 10 Exchequer, 195.]

May 15, 1875.

[IN THE EXCHEQUER CHAMBER.]

TYERS and Others v. THE ROSEDALE AND FERRYHILL IRON COMPANY, LIMITED (1).

Contract of Sale of Goods—Delivery by Instalments—Monthly Deliveries—Forbearance of Vendor at Request of Vendee.

The defendants in October, 1870, contracted to sell to the plaintiffs 2,000 tons of iron "delivery in monthly quantities [of 166½ tons] over 1871, or sooner if required;" payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December, 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871, up to and including November. In December the plaintiffs required delivery of the residue of the whole 2,000 tons. The defendants refused it, and denied that they were

(1) Reversing 7 Eng. Rep., 278.

1875

Tyers v. Rosedale and Ferryhill Iron Co.

liable to deliver any more iron under the contract, except what was due on the monthly balance. The plaintiffs then brought an action for non-delivery.

The majority of the Court of Exchequer (Kelly, C.B., and Pigott, B.) held that the plaintiffs having themselves requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2,000 tons in December, and were therefore not entitled to recover; but Martin, B., dissenting, held that the original contract had not been put an end to by the plaintiffs' application to the defendants not to deliver full monthly quantities between February and November, 1871, and that the defendants were bound to deliver the whole 2,000 tons under their contract:

Held, by the Exchequer Chamber, reversing the judgment of the court below, that, without deciding whether the defendants could be required to deliver in December at once the whole balance of the 2,000 tons, they remained liable to deliver it at some reasonable time, and not having asked for such reasonable time, but having repudiated their liability, they had no defence to the action.

APPEAL from the decision of the Court of Exchequer, making absolute a rule to enter a verdict for the defendants: Law Rep., 8 Ex., 305.

The pleadings and the material part of the case are set [196] out *in the report in the court below. It is unnecessary to give the correspondence, as the facts can be gathered from the head-note, but it may be here mentioned, that when the defendants wrote refusing to deliver the balance of the iron in December, the plaintiffs wrote insisting upon the delivery of the balance of the 2,000 tons, and the defendants replied denying that they were liable to deliver any more than what was due on the monthly balance, and that in the action the defendants paid into court sufficient to cover the deficiency due on the monthly balance. Blackburn, J., who tried the case without a jury, ruled that the effect of the different postponements, at the request of the plaintiffs, by the consent of the defendants, was not to put an end to the contract, but only to postpone the time for the delivery, and consequently there was a breach of contract. He reserved leave to the defendants to move to enter a verdict on the construction of the documents and correspondence. As to the damages, he further ruled that the breach was on the day in December when the defendants definitively refused delivery, and that the damages were to be estimated at that date, the defendants to have leave to move that the damages be estimated at any other period or upon any other principle the court might lay down, and to reduce the damages or enter the verdict accordingly. A verdict was entered for the plaintiffs in pursuance of this ruling, and a rule *nisi* was afterwards granted to enter a verdict for the defendants or to reduce the damages on the ground that the quantities undelivered were so undelivered at the request of the plaintiffs, and that the plaintiffs were not ready and willing to take them when they ought to have

been, and that the plaintiffs were not entitled to sue in respect of them, that the original contract was abandoned or varied, that no new contract to the effect alleged by the plaintiffs resulted from the evidence, that the damages ought to be calculated at the monthly prices of each month's deficiencies, and that the money paid into court was enough, and that the postponement (if any) was not to the month of December, and that the breaches should have been taken each month to the 1st of December.

Against this rule, which was made absolute by the Court of Exchequer (Martin, B., dissenting), the plaintiffs appealed.

Cave, for the plaintiffs: First, the question whether the parties *did or did not enter into a new contract was [197 one of fact for the judge at the trial.

[*Herschell*, Q.C., for the defendants, intimated that he should not contend that there was no writing to satisfy the Statute of Frauds.]

The substantial question is, can anything be found in the correspondence to exonerate the defendants from their liability to deliver the whole 2,000 tons of iron? It will be observed that they did not ask for a reasonable time to enable them to deliver the balance, but insisted that they were only liable for the December delivery. There are no cases which throw much light upon the effect of the correspondence. *Ogle v. Vane* (¹), which was referred to in the court below; has very little bearing upon the subject. Secondly, with regard to the damages, it is not likely to be disputed that, as there was a rising market, it was a positive advantage to the defendants to have them assessed as though the breach were in December.

Herschell, Q.C. (*Waddy*, Q.C. with him), for the defendants: No objection is now taken to the period with respect to which the damages were assessed. But as to the defendants' liability to deliver the 2,000 tons, it is contended that the judgment of the court below was right. The plaintiffs are bound to show that they were ready and willing to receive the iron when it ought to have been delivered.

[BLACKBURN, J.: The answer is, "We were ready to receive the iron when you were ready to deliver it, but we requested you to receive it, and you consented."]

The liability of the plaintiffs to receive must stand or fall with the liability of the defendants to deliver. The parties intended that upon each occasion when an instalment was not received the defendants should not be bound henceforward

(¹) Law Rep., 2 Q. B., 275; Law Rep., 3 Q. B., 272.

1875

Tyers v. Rosedale and Ferryhill Iron Co.

to deliver it. It is most unreasonable to suppose that it was meant that the whole balance of the iron should be called for at the end of the year. [He cited *Brown v. Muller* (').]

Cave was not heard in reply.

COCKBURN, C.J.: I am of opinion that the judgment of the Court of Exchequer must be reversed. I think that the [198] true view *of the case was taken by the dissenting judge, Baron Martin. There was a contract to purchase 2,000 tons of iron to be delivered in monthly instalments. It did not suit the purchasers to take the iron in the instalments originally contemplated by the parties, and they proposed to the sellers to postpone from time to time the delivery of the monthly instalments. Now it would have been perfectly competent to the defendants to say, "We will not acquiesce in that proposal of yours. You are bound to take the iron month by month, and you must so take it, or consider the contract at an end." Instead of doing that the defendants, as I read the letters, acquiesced, not in holding the contract at an end, but in postponing the period of delivery. The iron was to be delivered in the course of the year 1871, and there was, by reason of this postponement, a very considerable arrear at the end of this year. Then the plaintiffs call on the defendants to deliver at once the whole of what remained undelivered. I think that this was a demand which they were not entitled to make. I think that the postponement had the effect of carrying the period of delivery over the year 1872, but that the defendants could not be called upon to deliver 1,000 tons of iron at one time, but only in such quantities as was originally provided for. Therefore the defendants might have said, "We shall not deliver the whole that remains in one mass, but we will deliver it according to the terms of the contract." But they did not say this. What they said was, "We will not deliver you anything at all." There I think they were wrong. Consequently, there was a breach of the contract, for which the defendants are liable in damages.

The question of the damages might have been a matter of nice calculation, as to what was the damage in respect of each monthly instalment of the period which still remained for delivery. But, fortunately, that question does not arise here, for the assessment of damages at the December market-place is advantageous to the defendants, and not to the plaintiffs. I think the true effect of the correspondence is that there was merely a postponement of the period of delivery of the instalments, the contract still remaining open,

(1) Law Rep., 7 Ex., 319.

and both parties being bound by it. I think, therefore, that the judgment of the court below should be reversed.

BLACKBURN, J.: I am of the same opinion. It is hardly *necessary for me to say more than that I entirely [199 agree with the judgment of Baron Martin in the court below, but I wish to draw attention to two points which need not be decided here. The first is this, whether, when the postponement of deliveries took place at the plaintiffs' request, the effect was to make the balance of the iron deliverable during the rest of the year 1871 by monthly instalments, or whether the plaintiffs had a right to require to have it all delivered in December. I do not think it necessary to decide this point, for in December the defendants in effect said, "We will deliver a certain quantity, and no more at any time." Had they said, "We want a reasonable time, and no more," I should have been willing to construe the agreement in that way. But they did not ask for time; they refused to deliver anything but the monthly quantity.

Then comes the other question, what, when there is a complete breach of the contract in December, was the measure of damages? Is it what would enable the plaintiffs to go into the market and purchase the iron at the then market-price, or ought the damages to be computed by the different monthly prices which prevailed afterwards, ascertained as a matter of fact, or ought the calculation to be made before the trial? This, again, is a question upon which I do not wish to express an opinion, as it does not arise here, inasmuch as it appears that the amount ascertained by taking the price in December was more favorable to the defendants than if it had been taken afterwards.

MELLOR and LUSH, JJ., concurred.

BRETT, J.: I agree with the judgment of the Lord Chief Justice, but I desire to reserve my opinion as to the measure of damages, and as to whether, for that is really what it comes to, the case of *Roper v. Johnson*⁽¹⁾ decides the point.

LINDLEY, J., concurred.

Judgment reversed.

Attorneys for plaintiffs: *Torr & Co., for Middleton & Sons, Leeds.*

Attorney for defendants: *J. Scott, for Hodge & Harle, Newcastle-upon-Tyne.*

⁽¹⁾ Law Rep., 8 C. P., 167.

C A S E S
DETERMINED BY THE
COURT FOR CROWN CASES RESERVED
IN
EASTER TERM, XXXVIII VICTORIA.

[Law Reports, 2 Crown Cases Reserved, 147.]

April 24, 1875.

147]

*THE QUEEN V. TAYLOR.

Accessory before the Fact—Manslaughter—Fight—Stakeholder.

Two men, having quarrelled, agreed to fight with their fists, and to bind themselves to fight each put down £1, so that £2 might be paid to the winner. The prisoner consented to hold the £2, and pay it over to the winner. Otherwise he had nothing to do with the fight, and he was not present at it. There was no reason to suppose that the life of either man would be endangered.

The men fought, and one of them received injuries of which he afterwards died. The prisoner having been informed who was the winner, but not knowing of the other man's danger, paid over the £2 to the winner:

Held, that the prisoner was not an accessory before the fact to the manslaughter of the man killed.

CASE stated by Brett, J.

William Taylor was tried at the Central Criminal Court, on the 8th of April, 1875, on a charge that he was an accessory before the fact to the manslaughter of one Dulgar by one Tubbs. It was proved that Tubbs and Dulgar had quarrelled, and had, in consequence, agreed to fight with their fists; and that in order to bind each other so to fight upon such quarrel, each put down a sum of £1, so that £2 might be paid to the winner; that the money was deposited with the prisoner as a stakeholder, and that he consented to hold it as such until after the fight, and then pay it to the winner.

The prisoner did not in any way, otherwise than by so consenting to hold and pay over the money, promote or encourage either the quarrel or the fight. There was nothing then, or at any time before the fight, to lead any one reasonably to suppose, and the prisoner did not suppose, that the

fight would endanger the life of *either of the combat- [148
ants. Tubbs and Dulgar fought on the 1st of February,
1875. The prisoner was not present at the fight. The fight
was a fair fight, in which the men used only their fists.
Until near the close, there was no danger of death to either
of them, and no reason to apprehend such danger. Towards
the end Dulgar was advised to yield, but refused, and con-
tinued to fight. At last he yielded, and acknowledged that
he was beaten.

If Dulgar had not so continued to fight he would not have
died or have been in danger of dying. By so continuing to
fight and thereby receiving further injuries from Tubbs, Dul-
gar became exhausted, and afterwards, in consequence,
died. Tubbs was tried and pleaded guilty to a charge of
manslaughter, and was sentenced. After the fight, the pris-
oner, on being told that Tubbs had won the fight, but without
being told or knowing of Dulgar's danger, paid the £2 to
Tubbs.

The learned judge directed the jury, for the purpose of
the day, that if the prisoner held the money for the purpose
of handing it to the winner of the proposed fight, he was by
that alone, in point of law, an accessory before the fact to the
breach of the peace which subsequently took place, and inas-
much as that breach of the peace ended in manslaughter, he
was an accessory before the fact to that manslaughter. The
jury thereupon found the prisoner guilty. The learned judge
respected the sentence.

The learned judge desired the opinion of the Court of
Criminal Appeal, whether such direction was correct in
point of law, and whether upon such direction and facts the
prisoner could properly be convicted of the crime of being
an accessory before the fact to the crime of manslaughter.

If the court should be of opinion that the prisoner was
properly convicted on such direction and facts, the convic-
tion was to stand, if otherwise, the conviction was to be
quashed.

No counsel appeared for the prisoner.

Poland, for the prosecution: The prisoner was an acces-
sory by abetting the fight. He consented to hold the stakes
which were deposited for the very purpose of binding the
men to fight.

[MELLOR, J.: Can there be an accessory before the fact
to a manslaughter of this kind, which is not in any way
contemplated beforehand, but which occurs accidentally?]

*A person who is a party to the breach of the peace [149
which is contemplated, becomes thereby accessory to the

1875

The Queen v. Taylor.

manslaughter which occurs during the course of it: *Reg. v. Gaylor* ⁽¹⁾; Hawkins' Pleas of the Crown, book 2, ch. 29, ss. 16, 17, 18.

COCKBURN, C.J.: This conviction cannot be supported. The indictment was for abetting a manslaughter. The facts were that the manslaughter occurred in the course of a fight. The accused was not present at the fight, and all he had to do with it was that he consented to hold £2, which the men about to fight deposited by way of binding themselves to fight, and to be given to the winner. It appears to me that to support an indictment against a man as an accessory by abetting an offence, there must be some sort of active proceeding on his part. He must incite, or procure, or encourage the act. 'At first I was struck with the view that the stakes were something essential to the fight, and that the prisoner by holding the stakes might be said to participate in the fight. But I do not think the mere consent to hold the stakes can be said to amount to such a participation as is necessary to support the conviction.

The question suggested by my Brother Mellor, whether there can be an accessory before the fact to a manslaughter of this nature, is one of great difficulty, and it is not necessary to decide it in the present case.

BRAMWELL, B.: I am of the same opinion. The question is whether there has been an abetting. I think there has not. Nothing that the accused did assisted or enabled the fight to take place.

MELLOR, J.: I am of the same opinion. We need not settle the question to which I called attention during the argument. For there is no evidence that the accused engaged the two men to fight, or assisted or counselled them to it.

BRETT, J., and POLLOCK, B., concurred.

Conviction quashed.

Attorney for prosecution: *Solicitor to the Treasury.*

(¹) Dears. & B. Cr. C., 288.

To render one an accomplice he must be present at the commission of the offence, aiding and abetting the same: *Dull v. Commonwealth*, 25 Grattan (Va.), 965; *Wison v. People*, 5 Park., 120.

But if the accused, pursuant to concert with one who commits a crime, be present within easy call to aid and assist the offender in his purpose or in escaping or in getting rid of or misleading the victim, he is as guilty as if he

himself had actually committed the offence: *Wison v. People*, 5 Park., 120; *Dull v. Commonwealth*, 25 Grattan (Va.), 965; *Commonwealth v. Fortune*, 105 Mass., 592; *The Boston Massacre*, by Kidder (Munsell's ed.), 240, 259, and numerous authorities cited; *Reg. v. Vanderstein*, 10 Cox's Cr. Cas., 177; *Doan v. State*, 26 Ind., 495; *Warden v. State*, 24 Ohio St. R., 143; *Thurtell's Trial*, 265, *et seq.*

And may be convicted under an in-

dictment charging him, in the usual form, as principal: *Commonwealth v. Fortune*, 105 Mass., 592; *Temple v. People*, 4 Lansing, 119; *Doan v. State*, 26 Ind., 495; *Warden v. State*, 24 Ohio St. R., 143.

See *People v. Campbell*, 40 Cal., 129.

Though the offence may be charged to have been committed by one, the others being present aiding and abetting: *Rez v. Toule*, Russ. & Ryan, 314; *Temple v. People*, 4 Lansing, 119; *Shea v. The Queen*, 3 Cox's Cr. Cas., 141; *People v. Valencia*, 43 Cal., 552.

A spectator in a gambling house is not an accomplice though he occasionally advise one of the players as to the best card to play: *Smith v. State*, Shepherd's (Ala.) Sel. Cas., 84, 87 Ala., 472.

So one who engages in the play of ten pins, but does not bet upon the game, is not an accomplice to one who does: *Ross v. State*, Shepherd's (Ala.) Sel. Cas., 87, 87 Ala., 469.

A detective who enters into communication with criminals without any felonious intent, but for the purpose of discovering and making known their secret designs and crimes, and acts throughout with this original purpose, is not to be regarded as an accomplice. The question whether he was so acting is one of fact for the jury: *State v. McKean*, 36 Iowa, 343; *Rez v. Despard*, 28 Howell's St. Tr., 489; *Com. v. Downing*, 4 Gray, 29.

One who did not know of a larceny until it was committed, but who purchased the stolen property under the directions of an officer with a view of detecting the thief is not an accomplice: *People v. Barrie*, 49 Cal., 342.

A person who stands by, when an attempt is made by others to commit a rape, but who does no act to aid, assist or abet its commission, is not guilty of an attempt to commit a rape: *People v. Woodward*, 45 Cal., 293; *Connaughty v. The State*, 1 Wisconsin, 159.

The accused must aid and abet the very act by which the particular crime is effected: *Rez v. McIlhone*, 1 Crawford & Dix's C. C., 156.

Mere presence is not sufficient to constitute the party a principal, without he aids, assists or abets.

To instruct a jury that "if the prisoner was standing by, within a few feet

of the assailants, and if he did not interfere, or attempt by word or act to arrest the violence, it is a strong circumstance against him—it may of itself satisfy you of his advising or procuring the blows to be inflicted"—is error: *Connaughty v. The State*, 1 Wisc., 159.

See Thurtell's Trial, 265.

For the jury to regard a witness as an accomplice he must be proved so beyond a reasonable doubt: *Commonwealth v. Ford*, 111 Mass., 394.

Where sufficient proof to justify a jury in finding one to be an accomplice, whether he was one in fact is a question for the jury: *State v. McKean*, 36 Iowa, 343; *Commonwealth v. Glover*, 111 Mass., 395; *Rez v. McIlhone*, 1 Crawford & Dix's C. C., 156.

Even though the alleged accomplice deny that he voluntarily participated in the crime: *Commonwealth v. Snow*, 111 Mass., 411.

The spectators of a *sparring match* are not *particeps criminis* so that their evidence, touching what occurred at the match, requires corroboration. There is nothing unlawful in sparring unless, perhaps, the men fight on until they are so weak that a dangerous fall is likely to be the result of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match, does not amount to manslaughter: *Regina v. Young*, 10 Cox's Cr. Cas., 371.

If, however, two parties agree to *fight* each other and do so, the act being *per se* unlawful, each is responsible, even to the extent of murder, for the consequences: *Nelson v. People*, 5 Parker, 39, 50, affirmed 23 N. Y., 293; *Whiteley's case*, 1 Lewin's C. Cas., 173; *State v. Underwood*, 57 Missouri, 40.

An accessory after the fact may be guilty as such though he do no act, provided he employ an innocent principal to perform it: *People v. McMur-ray*, 4 Park., 234.

A felony may be committed through the instrumentality of an agent without the presence of the principal, when the agent is an innocent party; but if the person employed is guilty, he is the principal in the felony, and his employer is only an accessory: *Wilson v. People*, 5 Park., 120.

If the principal totally and substan-

1875

The Queen v. Foulkes.

tially departs from the instructions of an accessory, and commits a different offence or an additional offence, he stands single in such different or additional offence, and the other is not held responsible for it as accessory: *Walter v. The State*, 5 West Va., 532.

Though one indicted as an accessory before the fact cannot be convicted upon proof that he was present at the commission of the offence aiding and abetting: *Rez v. Gordon*, 1 Leach (4th ed.), 515, 1 East's Pl. Cr., 352.

An accessory must be indicted as such. He cannot be convicted on an indictment charging him as principal: *Regina v. Fallen*, 9 Cox's Cr. Cas., 242.

See also note to *Berigan's case*, Six Circuit Cases, 195, note (b.); *Thornton v. The Commonwealth*, 24 Grattan, (Va.), 657; *Campbell v. The State*, 40

Cal., 129; *Able v. Com.*, 5 Bush (Ky.), 698; *Meister v. People*, 31 Mich., 100.

See by statute, *Mary Hunter's case*, 1 Lewin's C. C., 4; *Dempsey v. People*, 47 Illinois, 523; *Yoe v. People*, 49 Illinois, 410.

Though the principal and accessory may be indicted together: *King v. Morris*, 2 Leach (4th ed.), 1096.

For precedents of indictments against principals in the second degree, and also against accessories, see 6 Cox's Cr. Rep., Appendix, pp. C, CI.

As to the technicalities which exist between principals in the second degree and accessories and necessary allegations: see 1 Stark. Cr. Pl. (2d ed.), 139-143; *People v. Crenshaw*, 48 Cal., 65; Archb. Cr. Pr. and Pl. (17 Eng. ed.), 8-16; 1 Whart. Cr. Law., §§ 112-154; Bish. St. Crimes, Bish. Cr. Law, Bish. Crim. Prac.

[Law Reports, 2 Crown Cases Reserved, 150.]

April 24, 1875.

150]

*THE QUEEN V. FOULKES.

Embezzlement—Clerk or Servant.

The prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office and in the business of the board. In his father's absence the prisoner acted for him at the meetings of the board, and when present he assisted him. The prisoner was not appointed or paid by the board; and there was no evidence that he received any salary from his father. The board having occasion to raise a loan on mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use:

Held, that there was evidence that the prisoner was a clerk or servant, or employed as a clerk or servant, and was guilty of embezzlement.

CASE stated by Quain, J.

The prisoner was tried at the last assizes for Shropshire for embezzlement. The indictment on which the prisoner was tried contained four counts. On the first count he was charged, that on the 22d of September, 1871, he was employed as clerk to the local board of Whitchurch and Dodington, and received £600 on account of the said local board, and did steal £100, parcel of the said £600, the moneys of the said local board, his employers. On the second count, that on the 14th of February, 1872, he embezzled the sum of £100, the moneys of the said local board, his employers. On the third count, that on the 22d of September, 1871, he embezzled the sum of £100, parcel of a sum of £600, the

moneys of Charles Foulkes, his master. On the fourth count, that on the 14th of February, 1872, he embezzled the sum of £100, the moneys of Charles Foulkes, his master. Charles Foulkes, the father of the prisoner, was appointed clerk to the local board of Whitchurch and Dodington, at a salary of £40 a year, and continued to hold such appointment till his death. Charles Foulkes held various other appointments. The business of the board was transacted at his office, the board paying him a rent for the use of it. The prisoner lived with his father, and assisted him in his office and in conducting the business of the local board. In the absence of his father, prisoner acted for him at the meetings of the local board, and assisted his father when present. Prisoner was not appointed or paid by the local board. There was no evidence that prisoner was paid any [15] salary by his father. The only evidence was that he in fact assisted his father as clerk or servant or assistant in his office as above described. In the year 1871, and while Charles Foulkes was clerk to the local board as above mentioned, the board had occasion to raise a loan for the purpose of building a market. The money was raised on mortgages of the local rates. The prisoner managed the business of the loan for his father. He filled in the usual form of mortgage, and either he or his father obtained the proper signatures of the members of the local board. The course of business was, that prisoner received at his father's office the money from the mortgagees, in exchange for the mortgages, and paid it into the Whitchurch and Ellesmere Bank (who were the treasurers of the board) to an account called the "market account." In the course of this employment he embezzled and appropriated to his own use the two sums of money mentioned in the indictment. It was objected by counsel for the prisoner, that he could not be convicted on the first two counts of the indictment, as he was not a clerk or servant of the board, nor employed by the board in that or any other capacity; and that he could not be convicted on the third or fourth counts, as there was no evidence that he was the clerk or servant of his father, or was employed by him in that capacity, beyond the fact that he assisted his father; and that the moneys embezzled were not the moneys of Charles Foulkes, but of the local board. The prisoner was convicted and sentenced, but the learned judge respited the execution of the sentence till after the decision of the court on this case. The question for the court was, whether upon the above facts the prisoner could be properly convicted on any of the counts of the indictment. The following cases were

1875

The Queen v. Foulkes.

cited before the learned judge: *Reg. v. Negus* ⁽¹⁾, *Reg. v. Beaumont* ⁽²⁾, *Reg. v. Tyree* ⁽³⁾; and the 11 & 12 Vict. c. 63, s. 138, was referred to as authorizing the board (the district being a non-corporation district) to allege that the property was the property of their clerk.

Rose, for the prisoner: The prisoner could not properly [52] be *convicted of embezzlement. To constitute embezzlement by a person "being a clerk, or servant, or being employed for the purpose or in the capacity of a clerk or servant" ⁽⁴⁾, there must be a contract of service of some kind express or implied. In the present case there was none; for the prisoner was in no sense in the employment of the local board, and the services he rendered to his father were mere voluntary services, not rendered in pursuance of any contract. [He cited *Rex v. Burton* ⁽⁵⁾; *Rex v. Nettleton* ⁽⁶⁾; *Reg. v. Bowers* ⁽⁷⁾; *Reg. v. Tyree* ⁽⁸⁾; *Reg. v. Turner* ⁽⁹⁾; *Reg. v. Cullum* ⁽¹⁰⁾; *Reg. v. Negus* ⁽¹¹⁾.]

No counsel appeared for the prosecution.

COCKBURN, C.J.: I think there was evidence on which the jury might well find that the prisoner either was a clerk or servant, or was employed as a clerk or servant. The father held various offices, and the prisoner, his son, in consequence of his father's illness, or for other reasons, did the duties which the father would otherwise have had to do himself or to employ a clerk to do. It is true there was no contract binding him to go on doing those duties. But the relation of master and servant may well be terminable at will, and while the prisoner did act he was a clerk or servant.

The second question is, whether there was an embezzlement. I think there was. The money was to be received by the father, though received for the local board. He was the proper custodian of the money, and the son received it for him. There was, therefore, evidence upon both points.

BRAMWELL, B.: I am of the same opinion. If the prisoner had not been the son of the man for whom he acted, and [53] had not lived *with him, it is abundantly evident that he would have been a clerk or servant, and would have been

⁽¹⁾ Law Rep., 2 C. C., 34.

⁽²⁾ Dears. Cr. C., 270; 23 L. J. (M. C.), 54.

⁽³⁾ Law Rep., 1 C. C., 177.

⁽⁴⁾ By 24 & 25 Vict. c. 96, s. 68: "Whoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered

to or received or taken into possession by him for or in the name or on the account of his master or employer . . . shall be deemed to have feloniously stolen the same from his master or employer. . ."

⁽⁵⁾ 1 Moo. Cr. C., 237.

⁽⁶⁾ 1 Moo. Cr. C., 259.

⁽⁷⁾ Law Rep., 1 C. C., 41.

⁽⁸⁾ 11 Cox Cr. C., 551.

⁽⁹⁾ Law Rep., 2 C. C. 28.

entitled to payment upon a *quantum meruit*. Then what difference can his being a son make. It may affect the nature of his remuneration; but nothing else.

With regard to the money, the father might have had to account for it; but he was entitled to receive it from the son. Therefore there was an embezzlement.

MELLOR, J.: The only difficulty which I can collect that the learned judge felt was, that there was no evidence of an actual contract of employment. But there is clear evidence that in what the prisoner did he was a clerk or servant.

BRETT, J.: The prisoner undertook to do things for his father which a clerk does for his master, and to do them in the way a clerk does them. Now, assuming that there was no contract to go on doing those things, still as long as he did them with his father's agreement, he was bound to do them with the same honesty as a clerk, because he was employed as a clerk.

POLLOCK, B.: If it had been necessary to say absolutely that the prisoner was clerk or servant, I should have hesitated. But I think the words "employed as a clerk or servant," are wider, and that there is evidence to bring the case within them.

Conviction affirmed.

Attorney for prisoner: *G. F. Cook, for Chandler, Shrewsbury.*

In ordinary cases it is a question of fact for the jury whether the relation of master and servant existed: *Reg. v. Chater*, 9 Cox, 1.

So whether a woman who lived with a man, not her husband, as his wife: *Reg. v. Warren*, 10 Cox, 359.

Though a petition be filed against the master as a bankrupt, the property may be charged as that of the master until adjudication: *Reg. v. Dixon*, 11 Cox, 178.

Though the embezzlement be at different times of money to be paid over regularly in a gross sum, it may be charged as of the gross sum due at the proper period for payment, and evidence of the items received given: *Reg. v. Balls*, 12 Cox, 98, L. R., 1 C. C. Res., 328; *Reg. v. Gorbutt*, 7 Cox, 221.

See *Ward v. Law, etc.* 9 Law Reporter, N. S., 650; *Commonwealth v. Tuckerman*, 9 Law Reporter, N. S., 503.

The fact that the servant properly

enters the receipt of the money in his master's books will not save him from being guilty of embezzlement in appropriating it to his own use: *Reg. v. Lister*, 7 Cox, 203; *Reg. v. Gorbutt*, 7 Cox, 221.

It has been held that the following persons were servants or agents in such a sense that they were guilty of embezzling property which came to their hands as such:

One employed by the station agent of a railroad company to deliver property, collect the freight and account to the station agent: *Reg. v. Thorpe*, 8 Cox's Cr. Cas., 29.

A railroad conductor: *Reg. v. King*, 12 Cox's Cr. Cas., 73.

A miller's foreman authorized to make sales and receive payments thereon: *Reg. v. Betts*, 8 Cox, 140; *Re v. Barker*, Dowling & Ryland's N. P., 19.

Though paid for his services out of the profits: *Reg. v. McDonald*, 9 Cox, 10.

1875

The Queen v. Foulkes.

The secretary of a building society: *Reg. v. Hastie*, 9 Cox, 264; *Reg. v. Tongue*, 8 Cox, 386; *Reg. v. Depprose*, 11 Cox, 185; *Reg. v. Redford*, 11 Cox, 367; *Reg. v. Proud*, 9 Cox, 22; *Commonwealth v. Tuckerman*, 9 Law Reporter, N. S., 503.

Though not guilty of larceny: *Reg. v. Hassal*, 8 Cox, 491.

Otherwise as to a married woman with whom a box of valuables was left as a bailee: *Reg. v. Robinson*, 9 Cox, 29; *Reg. v. Bunkall*, 9 Cox, 422, L. & C., 371.

Or one to whom, by mistake, a carman delivered goods: *Reg. v. Little*, 10 Cox, 559.

An assistant overseer of a township: *Reg. v. Guildler*, 8 Cox, 372; *Reg. v. Carpenter*, 10 Cox, 246, L. R., 1 C. C. Res., 29.

The land agent of a corporation: *Reg. v. Gibson*, 8 Cox, 436.

The servant of a trades union though some of its rules were illegal: *Reg. v. Stainer*, 11 Cox, 483, 1 C. C. Res., 230.

A carrier, by statute: *People v. Nichols*, 3 Park., 579.

But the goods must be technically delivered for transportation as a carrier: *State v. Slotter*, 38 Iowa, 321.

The agent of an insurance company, in New York: Laws 1873, p. 1059.

An auctioneer, in Massachusetts, by statute: *Com. v. Stearns*, 3 Law Reporter, 56, 190.

A public officer or officer, etc., of a corporation in some of the states, by statute: Laws New York, 1874, p. 228; *Reg. v. Moah*, 7 Cox, 60; *Hellings v. Com.*, 5 Rawle, 64; *State v. Boody*, 53 N. H., 610; *State v. Smith*, 13 Kansas, 274; *Commonwealth v. Tuckerman*, 9 Law Reporter, N. S., 503.

One who receives a watch to trade for a wagon, and to be paid \$5 for so doing: *State v. Foster*, 37 Iowa, 404.

The ticket agent of a railroad company: *The State v. Porter*, 26 Missouri, 201.

One who receives a note to sell, to receive the money and pay it over specifically to a third person though he give his own note as a memorandum receipt: *Com. v. Foster*, 107 Mass., 221;

See *State v. Snell*, 9 Rhode Island, 112.

But not a warehouseman with whom property is simply stored: *State v. Slotter*, 38 Iowa, 321.

The following persons have been held not to be:

One who carried on a business on his own account as the keeper of a refreshment house, who was employed to procure orders for the prosecutor's goods, collect the money and pay it over at once, rendering weekly accounts, being paid for his services by commissions: *Regina v. Walker*, 8 Cox's Cr. Cas., 1; *Regina v. May*, 8 Cox's Cr. Cas., 421, Leigh & Cave, 13; *Reg. v. Mayle*, 11 Cox, 150; *Reg. v. Bowers*, L. R., 1 C. C. Res., 41, 10 Cox, 250; *Reg. v. Marshall*, 11 Cox, 490.

Otherwise where the party had no independent business: *Reg. v. Turner*, 11 Cox, 551; *Reg. v. Bailey*, 12 Cox, 56.

But see *Reg. v. Tate*, 8 Cox, 458, Leigh & Cave, 29.

One employed by a committee of a friendly society to conduct an excursion, to sell tickets, he being a member of the society: *Reg. v. Brew*, 9 Cox's Cr. Cas., 398, Leigh & Cave, 346.

The assignor of choses in action employed by the assignee to collect them: *Reg. v. Barnes*, 8 Cox, 129.

A trustee of a friendly society is not guilty of larceny of the funds: *Reg. v. Loose*, 8 Cox, 302.

So the treasurer thereof: *Reg. v. Tyrie*, 11 Cox, 241, L. R., 1 C. C. Res., 177; *Reg. v. Wolstenholme*, 11 Cox, 313.

The deputy of a public officer: *Reg. v. Glover*, 9 Cox, 500.

A tradesman who, in good faith, receives materials for manufacture: *People v. Burr*, 41 How. Prac., 203.

One with whom money was deposited as a banker: *Re v. Mason*, Dowling & Ryland's N. P., 22.

One is not guilty under an indictment charging the embezzlement of money on proof of embezzlement of a check, without evidence that it had been converted into money: *Reg. v. Keena*, 11 Cox, 123, L. R., 1 C. C. Res., 118.

*In proper cases the indictment may charge the defendant as the servant of four different companies: *Reg. v. Bailey*, 7 Cox, 179.

It is sometimes a question of fact for the jury whether the defendant receives money by virtue of his employment: *Regina v. Arman*, Dearsly's C. C., 575.

CASES

DETERMINED BY THE

HIGH COURT OF ADMIRALTY

AND BY THE

ECCLESIASTICAL COURT,

IN AND AFTER

MICHAELMAS TERM, XXXVIII VICTORIA.

[Law Reports, 4 Admiralty and Ecclesiastical, 269.]

Nov. 17, 1874.

*THE KATHLEEN. (6733. 6740. 6769.) [269]

Salvage—Pleading—Right of Shipowner to Freight after Abandonment of Ship.

A bark laden with a cargo shipped at Charleston under bills of lading whereby the cargo was to be delivered on payment of freight at Bremen, whilst prosecuting her voyage to Bremen, was run into in the English Channel and damaged by another vessel, which was alone to blame for the collision. The master and crew of the bark abandoned her, and in her abandoned state she was taken possession of by salvors, who brought the bark and her cargo into Dover. The cargo was damaged by sea-water, and was alleged to be deteriorating. In a suit instituted by some of the salvors against the bark, her cargo, and freight, the court, on an application made on behalf of the plaintiffs, without notice to the owners of the bark, ordered the cargo to be sold. The owners of the bark afterwards hearing of the order, and wishing to have the cargo transhipped and carried on to its destination, applied to the court to rescind the order, and offered to give bail for the cargo. The court being of opinion that it was for the benefit of all parties that the cargo should be sold, refused to prevent the sale, but reserved all questions of freight. Afterwards the cargo was sold, and the proceeds brought into court, and the owners of the bark then applied to the court to order the payment out of the proceeds in court of a sum of money in respect of freight:

Held, that, by the abandonment of the bark, the contract to pay freight had been dissolved, and that the owners of the bark were not entitled to any payment in respect of freight.

THE Kathleen was a bark of 462 tons, and in December, 1873, was laden at the port of Charleston, in the United States of America, with a cargo consisting of 1,620 bales of cotton, under several bills of lading, whereby the same was

1874

The Kathleen.

to be delivered at the port of Bremen (the dangers of the seas excepted) unto the order of the several shippers or assigns, he or they paying freight for the said cotton at certain rates per pound of invoice weight (amounting for the whole of the said cotton to the sum of £2,081 16s. 1d.), and primage and average (amounting to the sum of £104 1s. 10d.) The Kathleen sailed from Charleston with the said cargo on board and was proceeding on her voyage to Bremen on the 24th of January, 1874, when she was run into in the English Channel, off Hastings, by the Mallowdale, an iron ship of about 1,200 tons which struck her on the port bow, cut her down, and otherwise did great damage to her. For this collision the Mallowdale was solely to blame. On the morning of the following day the master and crew of the Kathleen were compelled to leave her, as she had become unmanageable, and were taken on board the Mallowdale (which had remained by the Kathleen during the night), and landed at Deal. After the master and crew of the Kathleen had so left her, a French lugger, the St. Claire, of Boulogne, came up to the Kathleen, and some of the crew of the St. Claire went on board of the Kathleen, and remained there until after a number of fishing boats from Hastings had come up, and the men from the said Hastings boats had taken charge and possession of the Kathleen.

Eventually the said Hastings men, with the assistance of a lugger from Deal, and of the steam-tug Palmerston from Dover, succeeded in bringing the Kathleen and her cargo to Dover, where she arrived on the 27th of January.

On the 27th of January, 1874, a salvage suit (No. 6725) was instituted on behalf of the owners, master, and crew of the steam-tug Palmerston against the bark Kathleen, her cargo, and the freight due in respect thereof, and on the same day the Kathleen and her cargo were arrested at Dover by a warrant issued in the suit. The owners of the Kathleen having duly appeared, a commission of unlivery issued on the 30th of January, under which the cargo was unladen. On the 2d of February a salvage suit (No. 6733) was instituted on behalf of the owners, masters, and crews of the seven fishing luggers belonging to Hastings against the Kathleen, her cargo, and the freight due in respect thereof. After the institution of this last-mentioned suit the plaintiffs in suit No. 6725 abandoned that suit⁽¹⁾, and instituted on the 5th of February a fresh salvage suit (No. 6740) against the Kathleen, her cargo, and freight. The owners of the

(1) It is believed that this suit was abandoned owing to some informality in the proceedings.

Kathleen and the owners of her cargo appeared separately in each of the suits No. 673 and No. 6740. On the 9th of February the plaintiffs in cause 6733, at the instance of the owners of the cargo, but without notice to the owners of the Kathleen, and without their knowledge, applied for and obtained an order of the court to have the cargo appraised and sold. This order was made on an affidavit, which stated that the cargo was deteriorating in value. The owners of the cargo *formally consented to the order. On the [27] 12th of February the fact that this order had been made first came to the knowledge of the owners of the Kathleen, and their solicitors at once filed a notice of motion that they should move the court to set aside the order for the sale of the cargo, and to order that the owners of the Kathleen should be allowed, on giving bail in the salvage suits for the cargo, to carry the same on to its destination in order to earn freight, or to order that if the said order for sale were allowed to stand, the owners of the Kathleen should be paid the amount of their freight out of the proceeds of the sale.

Feb. 18, 1874. *Aspland*, on behalf of the owners of the Kathleen, moved the court in pursuance of the notice of motion: He offered to give bail for the cargo, and insisted on the right of the owners of the Kathleen to carry on the cargo so as to earn freight, or to be paid freight if the owners of the cargo preferred to demand delivery at Dover. In support of the motion affidavits were filed, in which it was stated that the owners of the Kathleen desired the cargo to be forwarded to Bremen, and that they were willing to give bail to satisfy the claims of the salvors in respect of the cargo; that the cargo was in a state as fit to be carried to Bremen as to London; that it would sell at Bremen to more advantage than in London, and that the cost of bringing the cargo to London would exceed the cost of taking the same to Bremen.

W. G. F. Phillimore, on behalf of the owners of the cargo, opposed the motion: Affidavits were filed on behalf of the salvors, in which it was stated that if the cargo was forwarded to Bremen it would be greatly depreciated, and that an immediate sale was necessary, and that the best thing to be done was to have the cargo conveyed to London by rail, and there sold.

E. C. Clarkson for the owners, masters, and crews of the English fishing luggers.

SIR ROBERT PHILLIMORE: I think that the duty of the court in the present stage of the case is clear. The evidence

1874

The Kathleen.

presented to me to-day establishes that this cargo is fast deteriorating through the damage it has sustained by salt water, and that it is for the advantage of all parties that a sale should take place at once. One thing alone is sufficient 272] to induce me to make this order of *sale, and that is, the owners of the cargo have expressed their wish for the sale, in order that further deterioration may be prevented. And, as I understand the matter, the owners of the cargo press for this sale, even if it should turn out that they are bound to pay freight for the cargo, whether in full or *pro rata*. At present I express no opinion as to whether the owners of the ship are entitled to freight. The shipowners can apply at a later stage of the case for the payment to them of freight, and the question can then be raised in a more formal manner on petition, so that not only my opinion can be taken, but also that of the Court of Appeal. That seems to me to be the right way to deal with the question of law, which is one of considerable importance and difficulty. As the proceeds of the sale of the cargo will be paid into court, the shipowners will have full security for their claim for freight. I therefore order the sale to take place, and for the purposes of the sale I order the cargo to be brought to London, and I reserve all questions as to freight (1).

Pursuant to this order the cargo was removed to London, and was sold by auction on the 12th of March, and realized £14,932.

(1) Another cause of salvage, No. 6769, was on the 27th of February, instituted on behalf of the owners, master, and crew of a French lugger, called the St. Claire, against the Kathleen, her cargo and freight, and a petition was filed in the suit. The salvage suits, No. 6733, and No. 6740, having been consolidated, a petition was filed in the consolidated suit. The petition in cause No. 6769, alleged that the St. Claire first fell in with the Kathleen after her abandonment, and the crew of the St. Claire began to tow her to Boulogne, when the Hastings fishing luggers came up, and the crews of the luggers forcibly dispossessed them. The petition in the consolidated cause alleged that when the Hastings fishing luggers came up to the Kathleen, the crew of the St. Claire were engaged in stripping the Kathleen, and were making no efforts to save her.

The owners of the Kathleen and the

owners of the cargo filed an answer to the petition in cause No. 6769. The 3d article of this answer referred to the petition in the consolidated cause and stated in substance, the allegations there made with reference to the alleged misconduct of the crew of the St. Claire, and the 4th article of the answer proceeded as follows:

"For the purposes of this answer, but not further or otherwise (the defendants being necessarily ignorant of the actual facts) the defendants herein adopt the allegations in the said petition on behalf of the said English boats contained, and aver that the same are respectively true."

On the 5th of May, G. Bruce, on behalf of the plaintiffs in cause 6769, moved the court to reject the third and fourth articles of the above answer on the ground that such articles were impertinent and embarrassing.

Butt, Q.C. and Aspland for the own-

*An act on petition was subsequently filed on behalf [273 of the owners of the Kathleen, which alleged, *inter alia*, that the cargo had been wet and had suffered damage from sea-water, but the same could have been reshipped and carried on to Bremen so as to arrive there in a merchantable condition as cotton, and the owners of the Kathleen could and were always ready and willing, and desired, and intended to reship and carry the same forward, taking due care of it, and using all necessary precautions against its further deterioration, and would have so done, and would have duly delivered it upon payment of freight according to the bills of lading, if they had not been prevented from doing so by the proceedings on the part of the owners of the said cargo.

The act on petition also contained the following averment:

In the circumstances above stated, the owners of the Kathleen submit that they are entitled to the freight which they would have earned by carrying the said cargo on to Bremen, if they had not been prevented from doing so by the intervention of the owners of the said cargo, and their election to take the same out of the shipowners' hands without their consent at an intermediate port, and that they are entitled (subject to the rights of the salvors of the said ship and cargo) to a lien upon the proceeds of the said cargo, now in the registry, in respect of such freight; and if not entitled to the full amount of such freight, that they are not entitled to freight *pro rata*, or to a reasonable remuneration for the carriage of the said cargo from Charleston as aforesaid. By the exertions and expenditure of the owners of the Kathleen, in carrying the said cargo from Charleston to Dover, the same was greatly increased in value.

The act on petition concluded with a prayer praying the judge to "declare that the owners of the Kathleen are entitled (subject to the rights of the salvors of the Kathleen and her cargo) to a lien upon the proceeds of the sale of the said cargo for the freight or other remuneration due to the said owners of the Kathleen in respect thereof . . . to re-

ers of the Kathleen, and *W. G. F. Phillimore*, for the owners of the cargo, opposed the motion.

SIR ROBERT PHILLIMORE: The only question which I have to decide is, whether the pleadings in the present case are in proper form or not. Now I am clearly of opinion they are not in proper form. The defendants must either elect to leave the matter on the statements of the plaintiffs, not denying their statements, but pleading ignorance of the real state of facts, and leave them to contest with the other salvors their right to recover salvage, or they must positively and directly raise the question of misconduct on the pleadings by alleging misconduct in the plaintiffs as a distinctive allegation

made by themselves, the defendants. I am of opinion that the third and fourth articles of the answer must be reformed. The mode of pleading which has been adopted is wholly without precedent in this court.

In consequence of the decision of the court, the defendants in cause 6,769 filed an amended answer, which, without referring to the pleadings in the consolidated cause, alleged substantive charges of misconduct against the plaintiffs.

June 19, 20, 22. The several salvage causes came on to be heard, and the judge found the charge of misconduct not proved, and awarded salvage reward to the plaintiffs in all the suits

1874

The Kathleen.

fer it to the registrar and merchants to ascertain the amount thereof, and to direct that (subject to the rights of the said salvors) the said owners of the Kathleen shall be paid the amount that may be due to them in respect of the premises out of the proceeds of the said cargo, and to condemn the owners of the said cargo in the costs of these proceedings, and that otherwise right and justice may be administered in the premises.”

The solicitors for the owners of the cargo filed an answer to the act on petition.

The answer alleged *inter alia* as follows:

The said cargo had been wet and had suffered considerable damage from sea-water. It could not have been reshipped at Dover. If it could have been reshipped it would have been only so reshipped after great delay and with much damage, and it would not have arrived at Bremen in a merchantable condition as cotton. If it had so arrived in a merchantable condition as cotton it would have been as cotton of greatly inferior kind and value. It was proper and necessary, in order to avoid a great depreciation in value, to sell and deliver the said cargo as quickly as possible.

By reason of the premises the owners of the Kathleen have no claim against the cargo or the owners thereof for any freight.

The owners of the Kathleen did not in any case fulfil their contract to carry the said cargo to Bremen, and are not entitled to any freight, or to any sum in respect of freight, or to any remuneration for carriage of the said cargo.

July 14, 1874. The question as to the right to freight now came before the court for decision. The affidavits used on the motion to rescind the order for sale were referred to, and additional evidence was given by witnesses examined in court on behalf of the owners of the Kathleen. The fresh evidence given went to support the allegations above referred to in the act on petition.

Milward, Q.C., and *Aspland*, on behalf of the owners of 275] the *Kathleen: The owners of the Kathleen are entitled to the full amount of the bill of lading freight. They were always ready and willing to perform their contract, and would have performed it had they not been prevented by proceedings instigated by the owners of the cargo. The owners of the cargo have therefore prevented the owners of the ship earning their full freight: *The Teutonia* (¹); *The Soblomsten* (²). The shipowners had a right to insist upon having the cargo carried forward: *Notara v. Henderson* (³); *Dakin v. Oxley* (⁴); *Tronson v. Dent* (⁵); *Great Northern Ry. Co. v. Swaffield* (⁶); *Jordan v. Warren Insurance Co.* (⁷); *Blasco v. Fletcher* (⁸).

If full freight is not due, *pro rata* freight is due. The

(¹) Law Rep., 4 P. C., 171.

(⁵) 8 Moo. P. C., 419.

(²) Law Rep., 1 A. & E., 293.

(⁶) Law Rep., 9 Ex., 132.

(³) Law Rep., 7 Q. B., 225.

(⁷) 1 Story, Rep. 342.

(⁴) 15 C. B. (N.S.), 646; 33 L. J. (C.P.),

(⁸) 14 C. B. (N.S.), 147; 32 L. J. (C.P.),

owners of the cargo have sanctioned the delivery of the cargo at Dover, and have derived benefit from the sale of the cargo: *The Soblomsten* ⁽¹⁾. The delay and inconvenience occasioned by the excepted perils was not such as to frustrate the object of the adventure, and therefore cannot affect the rights of the parties: *Tronson v. Dent* ⁽²⁾; *Cargo ex Argos* ⁽³⁾; *Notara v. Henderson* ⁽⁴⁾; *Cargo ex Galam* ⁽⁵⁾.

Butt, Q.C., *W. G. F. Phillimore*, and *Stubbs*: No freight is due, because the cargo has not been delivered at its port of destination. The owners of the cargo are not responsible for the action of the court; the court ordered the cargo to be sold because it was not in a fit state to be carried to its destination, and could not be carried to its destination. No act has been done by the owners of the cargo to raise any implied contract on their part to pay *pro rata* freight: *Vlierboom v. Chapman* ⁽⁶⁾.

By the abandonment of the vessel the contract of carriage was determined, and all right to freight was forfeited. [They cited *The Tritonia* ⁽⁷⁾; *The Dantzic Packet* ⁽⁸⁾; *The Clarisse* ⁽⁹⁾.

Milward, Q.C., in reply: The contract of carriage had not *been dissolved by the abandonment: *The [276 Aquilla* ⁽¹⁰⁾; *Thornley v. Hebson* ⁽¹¹⁾; *Briggs v. Merchant Traders' Insurance Association* ⁽¹²⁾; *The Propeller Mohawk* ⁽¹³⁾.
Cur. adv. vult.

July 22. SIR ROBERT PHILLIMORE: The Kathleen, a vessel laden with cotton, coming from Charleston to Bremen, came into collision with a vessel called the Mallowdale, on the 24th of January last. The damage which she received induced the master to abandon her; no blame attaches to him on that account; she was abandoned and became a derelict; she was afterwards saved in her shattered condition by certain salvors, English and French, and brought with her cargo into Dover, on the 27th of January. I awarded £3,350 salvage remuneration, with certain costs. On the 30th of January I made an order for unlivery of her cargo. On the 9th of February on an affidavit of the owners of the cargo as to the deterioration of the cotton, I ordered a sale to take place. On the 16th of February the unloading was completed. On the 18th of February the shipown-

⁽¹⁾ Law Rep., 1 A. & E., 293.

⁽²⁾ 8 Moo. P. C., 419.

⁽³⁾ Law Rep., 5 P. C., 134.

⁽⁴⁾ Law Rep., 7 Q. B., 225.

⁽⁵⁾ Br. & Lush., 167.

⁽⁶⁾ 13 M. & W., 230.

⁽⁷⁾ 2 W. Rob., 522.

⁽⁸⁾ 3 Hagg. Adm., 383.

⁽⁹⁾ Sw. Adm., 129.

⁽¹⁰⁾ 1 W. Rob., 37.

⁽¹¹⁾ 2 B. & Ald., 513.

⁽¹²⁾ 13 Q. B., 107; 18 L. J. (Q.B.), 178.

⁽¹³⁾ 8 Wallace, 153.

1874

The Kathleen.

ers offered to carry on the cotton to Bremen. I ordered the sale, however, at the request of the owners of the cargo, reserving all questions as to freight. The sale took place on the 12th of March. The ship sold for £580 and the cargo for £14,932; the freight claimed is £2,081 16s. 1d. The money (the produce of the sale of the cargo) has been paid into court; and I am now asked, after payment of the salvage reward, to deduct the freight, amounting to the sum mentioned, before the residue be paid out to the owner of the cargo. Whatever right the shipowner had has been preserved to him, for, as Mr. Justice Story said in the case of *The Nathaniel Hooper*⁽¹⁾: "The possession of the property by the court through its officers, is a possession protective of the interests of all concerned, and not displacing the rights or lien of any party." It is urged on behalf of the shipowner—first, that the cotton could have been carried on in another ship, and would have arrived at Bremen, though partially injured, in specie. Secondly, that he was willing [277] and ready to carry it on in another ship; *thirdly, that the collision was not in any way imputable to him or the consequence of his fault; fourthly, that the collision was one of the excepted perils in the contract contained in the bill of lading. All these propositions are true; it was further urged that it must be presumed that he would have taken proper measures for drying the cotton before it was transhipped. The case of *Notara v. Henderson*⁽²⁾ and *Blasco v. Fletcher*⁽³⁾ were relied upon. It was contended, therefore, that the shipowner was entitled to full freight, or at least to *pro rata* freight. According to the decisions at common law, however, a title to *pro rata* freight may arise out of a new implied contract with the shipowner to which both parties assent. But it was truly observed by Mr. Butt that in this case neither party consented. The shipowner resisted as much as he could the delivery of the goods, and each party stood upon what he considered to be his rights; the shipowner to carry on the cargo, the cargo-owner to receive the goods. Moreover it has been proved by the evidence, that the shipowner demanded full freight. I am of opinion that no *pro rata* freight is due. The only question in truth is, whether the shipowner is entitled to the full freight. I have been referred by the industry of counsel to a great many cases, and they contain valuable principles of law, but in all of them I think the element of mixed fact and law present in this case is wanting.

⁽¹⁾ 3 Sumner, 542, 553.⁽²⁾ Law Rep., 7 Q. B., 225.⁽³⁾ 14 C. B. (N.S.), 147; 32 L. J. (C.P.), 284.

In this case the vessel was a derelict ; in other words, the owner, through his agent, the master, had abandoned all possession of the ship, and at the time of abandonment had certainly lost all rights to freight or to carry on the cargo. It has been urged that the salvors have only a lien for their remuneration, and this is true. But it is also true that they are in lawful possession and cannot be displaced by the owners. When the salvage suit begins the property is placed in the custody of the court, which is bound to do what is best for it. In this case the court ordered the sale of the cargo for the benefit of the parties interested. If no claimant appears, the property in the ship would, after a certain length of time, belong to the Crown. Sir John Nicoll, in the case cited by counsel, *The Dantzic Packet* ⁽¹⁾, draws the distinction *between salvage rendered to a ship in distress [278 and to a ship abandoned. "It is different," he says, "in the case of a derelict ; there the first occupant has a vested interest and a right of exclusive possession, if alone he can save the property ; he takes possession indeed for the benefit of the Crown, in the first instance,—but subject to a liberal remuneration." It is, indeed, true that the original shipowners are allowed a *persona standi* in this court, and receive the remainder of their abandoned property after the legal charges on it have been satisfied ; but the same can be predicated of the owner of the cargo, which, if the contract still subsisted between him and the shipowner, would not be the case ; for the ship would have a right to represent the cargo as well as the ship. In fact, the possession of the cargo abandoned by the shipowner vested first in the salvors and afterwards in this court before it could be restored to the owners. On the whole, I am satisfied that the contingency provided for in the bill of lading, as nullifying the contract, namely, "the dangers of the seas," has happened, and that the original contract between the owners of the ship and of the cargo is at an end. I shall, therefore, grant no freight in this case.

On the 17th of November, 1874, the balance of the proceeds of the cargo was, by order of the court and after hearing counsel, directed to be paid to the legal holders of the bills of lading of the said cargo.

Solicitors for English salvors : *Clarkson, Son & Greenwell.*

Solicitors for French salvors : *Deacon, Son & Rogers.*

Solicitors for owners of the Kathleen : *Flux & Co.*

Solicitors for owners of cargo : *Stokes, Saunders & Stokes.*

(1) 3 Hagg. Adm., 383.

[Law Reports, 4 Admiralty and Ecclesiastical, 294.]

July 3, 1874.

[IN THE ARCHES COURT OF CANTERBURY.]

294]

*In re BETTISON.

Faculty for Erection of Schoolhouse on Burial Ground closed by Order in Council—16 & 17 Vict. c. 134—18 & 19 Vict. c. 128, s. 18.

Under special circumstances a faculty may be granted for the erection of a school on a portion of a parish churchyard closed for burials by order in Council.

In this case an application was made to the Chancellor of Rochester by the vicar and churchwardens of the parish church of St. Nicholas, Harwich, and the members of the national school committee of Harwich, for a faculty to authorize the erection of a school upon a part of the churchyard of St. Nicholas, Harwich.

The petition for the faculty stated in substance as follows: By an order made by the Education Department on the 21st of August, 1872, in pursuance of the Elementary Education Act, 1870, it was, amongst other things, ordered that additional public school accommodation should be provided for the parish of St. Nicholas, Harwich; and certain other requirements of the Education Department were at the same time made, all of which had been fulfilled. For some time previous to and ever since the date of the order, the national school committee had made every effort to procure a site suitable for the erection of an infant school, but had been unable to find one, owing to the small area of the parish and the density of the population. The only suitable site which could be obtained was the site in question, which adjoined the existing national schools. This site was the south-east corner of the churchyard, and was marked on a plan accompanying the petition. It comprised 1,200 square feet, being the amount required by the Educational Department, and about 250 square feet more for yard and offices. The churchyard was closed for burials under the provisions of the act 16 & 17 Vict. c. 134, in the year 1856. Very few burials had since taken place therein, and none in the ground on which it was proposed to erect the infant schoolroom. There had at no time been many burials in this ground, and none, it was believed, since the year 1828. There were no tombs or monuments on the proposed site. The Education Department had approved the proposed site, conditionally on a medical certificate of its healthiness being given; and there

was no doubt that such a certificate could be obtained, as the site was perfectly healthy. The national schools already existing and the proposed infant schools would be in union with the National Society for promoting the Education of the Poor in the Principles of the Established Church, and had imparted and would impart religious instruction according to the principles of the Church of England.

On the 19th of May, 1874, counsel moved the Chancellor of Rochester to decree a citation with intimation to issue, calling upon the parishioners of St. Nicholas, Harwich, and all other persons interested, to appear and show cause why the faculty should not be granted.

The learned Chancellor refused the motion, on the ground that he had by law no authority to grant a faculty for the erection of a school on a consecrated burial ground.

The vicar and the churchwardens and the members of the school committee interposed an appeal to this court; and on the 4th of June an inhibition and citation issued, citing the parishioners and inhabitants of the parish of St. Nicholas, Harwich, to appear in the registry on the sixth day after service to answer in the appeal and to do and receive as unto law and justice should appertain.

The inhibition and citation was duly served by affixing the same on the church door of the parish church of St. Nicholas, Harwich, on Sunday, the 14th of June, and leaving a copy affixed thereon; but no appearance was entered on behalf of the inhabitants or parishioners.

July 3. *W. G. F. Phillimore* appeared for the appellants, and moved the judge to reverse the decree of the court below, to retain the principle cause, and to order the faculty to issue. He referred to Phillimore's *Eccl. Law*, p. 2038, and to 18 & 19 Vict. c. 128, s. 18, and stated that Dr. Lushington had made similar orders⁽¹⁾. He called attention to the fact that the parishioners had not appeared, and that no opposition existed in the parish to the grant of the [296 proposed faculty; and, consequently, that if the court was of opinion that a faculty might legally issue, the issue of a further citation was, under the circumstances, unnecessary.

SIR ROBERT PHILLIMORE: I am of opinion that the learned Chancellor of Rochester ought to have issued a citation in this cause. I have considered the effect of the 18th section of the 17 & 18 Vict. c. 138, and I think there is nothing in that section to prohibit the erection of the school

⁽¹⁾ See *Campbell v. Parishioners of* 275; *Russell v. Parish of St. Botolph* (5 *Paddington and Others*, 2 Roberts, *Eccl. Jur.* (N.S.), 800); *Reg. v. Twiss* (Law Rep., 558); *Harper v. Forbes* (5 *Jur.* (N.S.), 4 Q. B., 407).

1874

In re Bettison.

on the proposed site. It appears from the allegations in the petition for the faculty, that the erection of this school is much required. The prayer of the appellants is that I should retain the cause, and I do not see any reason why I should refuse to grant the faculty.

The minute of the decree as entered in the registry, was in substance as follows:

July 3. Clarkson prayed the judge to reverse the decree of the court below, and to order a license or faculty to issue authorizing and empowering the appellants, the members of the national school committee, to erect upon a part of the churchyard of St. Nicholas, Harwich, marked A. in the plan deposited in the registry of the court below, an infant school with a yard and out-offices, in which school religious instruction will be given according to the principles of the Church of England. The judge having heard counsel thereon, by his interlocutory decree, having the force and effect of a definite sentence in writing, pronounced for the appeal and complaint made and interposed in this cause on behalf of Clarkson's parties, reversed the decree or order of the court below, retained the principal cause or application, and directed a license or faculty to issue under the seal of this court authorizing and empowering the Rev. W. J. Bettison, clerk, vicar of the vicarage and parish church of St. Nicholas, Harwich, in the county of Essex, diocese of Rochester, and province of Canterbury, William Groom, one of the churchwardens of the said parish, Francis Hales, Oliver John Williams, Thomas George, Richard Saxby Barnes, and Francis Richard Hales, members of the national school committee of Harwich, aforesaid, to erect upon the part of the churchyard of St. Nicholas, Harwich, aforesaid, marked A., an infant school, with a yard and out-offices, in which school religious education is to be given according to the principles of the Church of England.

On Thursday, the 15th day of July, the proctor for the appellants filed a notice in the registry praying the faculty, and on the same day the faculty issued.

Proctor for the appellants: *Clarkson*.

As to the law of burial, see 6 Alb. Law Jour., 151; 4 Id., 56; 8 Popular Science Monthly, 322; 10 Albany Law Jour., 70; *Brown v. Cure, etc.*, L. R., 6 Priv. Council Cases, 157 (Head notes at close of this note), as to the burial of Guibord at Montreal. The case, however, is more curious than useful in this country involving only the right of burial in a Catholic cemetery under the French Canadian law; Tyler's Ecc. Law, §§ 969-1163; Hoffman's Ecc. Law; Comyn's Dig., tit. Cemetery (C.); Girard's Titles to Real Estate (2d ed.), 563; High on Injunctions (1st ed.), §§ 241, 352, 539, 549; Hilliard on Injunctions (1st ed.), §§ 319, 508; Washb. on Easements (2d ed.), 604; 2 Waterman on Trespass, §§ 747-9; 3 Redfield on Wills, tit. Funerals; Williams on Executors, tit. Funerals; 1 Burns's Ecc. Law (8th ed., 1824), 255; *Adlam v. Colthurst*, L. R., 2 Adm. and Ecc., 30;

Dayton on Surr. (3d ed.), 813; *Sandar's Justinian*, lib. 2, tit. 1, § 9.

There is much curious and general information upon the subject of burial—not however legal in its character—in a work entitled "Dealings with the Dead, by a Sexton of the Old School," 2 vols., by Lucius M. Sargent, an eminent lawyer of Massachusetts, published by Dutton & Wentworth, and Ticknor & Fields, Boston, in 1856.

A contest as to who is entitled to inter the remains of another is of rare occurrence. One has, however, recently arisen, in a neighboring city, between the second wife and the children by the former wife, of an aged gentleman of considerable wealth; the widow claiming to inter the remains in a lot belonging to her, and the children claiming to inter them in a lot purchased and beautified by the deceased. Blackstone says (2 Bl. Com., 428-9),

"Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, or the coat armor of his ancestor there hung up, with the pennons and other ensigns of honor, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir. * * But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if any one, in digging up a dead body, steals the shroud or other apparel it will be felony: for the property thereof remains in the executor or whoever was at the charge of the funeral."

Lord Coke says, "the parson in such a case (i. e., for injuring tombstones) "is subject to an action to the heir," Coke Litt., 18 b, but that passage does not state what form of action is to be adopted": Best, Ch. J., *Spooner v. Brewster*, 8 Bing., 188.

"Or if a gravestone or tomb be laid or made, &c., for a monument of him in this case albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson or any take them or deface them, but he is subject to an action to the heir and his heirs in the honor and memory of whose ancestor they were set up": Coke Litt., 18 b.

The coat of arms placed in any window, or monument in the church-yard, cannot be beaten down or defaced by the parson, ordinary, church-wardens or any other; and if they be the heir by descent interested in the coat may have an action upon the case": *Frances v. Ley*, 3 Croke (James), 867.

"But if there be an *He*, built by a gentleman or by a nobleman, and he hath used to bury there, and then hath his ensigns of honor, as a gravestone, coat armor, or the like, which belongs not unto the parson, if he take them

the heir may well have an action of trespass": Coke, Ch. J., *May v. Gilbert*, 2 Bulstrode, 151.

"In Comyn's Dig., tit. Cemetery (C.), it is said that, 'if any one pull down or deface a tombstone or monument, the heir may have an action for it. So, if any one deface the arms, pennons, etc., put up in a window or elsewhere in honor of his ancestor': Willes, J., *Ashby v. Harris*, L. R., 3 C. P., 530.

In *Cowen's Case* (12 Coke, 105), the court referred to the case of Dame Wiche who had set up a coat of armor and pennons, with the arms of Sir Hugh Wiche, her husband, and a sword in a chapel where he was buried. The parson claimed them. The court, in speaking of that case, said (12 Coke, 105): "And the parson claimed them as oblations, and therefore that they did belong to him; and then it is holden that if one use to sit in the chancel and hath there a place, his carpet, livery and cushion, the parson cannot claim as oblations, neither ought he to have the said things, for that they were hanged there in honor of the deceased; and therefore, by the same reason, although a gravestone, coat of armor, tomb, etc., are annexed to the freehold of the parson, yet in regard the church is free to all the inhabitants for burying, the parson cannot take them."

And the Chief Justice said, that the lady might have a good action during her life in the case aforesaid, because she herself caused the said things to be set up there; and after her death the heir to the deceased shall also have his action because that (as the book says) they were hanged there for the honor of his ancestor, and therefore they are in the nature of heir-looms, which by the common law belong to the heir as being the principal of the family: the like law of a gravestone, tomb and the like."

In note C to Cowen's case it is said (12 Coke R., 105-6): "When once a monument is erected it cannot be removed without the sanction of the ordinary." (*Maidman v. Malpus*, 1 Hagg. Consis. 208). Monuments, coat-armor and other ensigns of honor, set up in memory of the deceased, may not be removed at the pleasure of the ordinary or incumbent. On the contrary, if either they or any person shall take

1874

In re Bettison.

away or deface them, *the person who set them up shall have an action against them during his life; and after his death, the heir of the deceased shall have the same, who, as they say, is inheritable to arms, &c., as to heir-looms; and it avails not that they are annexed to the freehold, though that is in the person.* But this, as I conceive, is to be understood with one limitation,—if they were set up with the consent of the ordinary. For though (as my Lord Coke says) tombs, sepulchres or monuments may be erected for the deceased in church, chancel, &c., in convenient manner, the ordinary must be allowed the proper judge of that convenience; inasmuch as such erecting (for so he adds) ought not to be in the hinderance of divine service. And if they are erected without consent, and upon inquiry and inspection be found to the hinderance of divine service, it will not (I hope) be denied in such a case, that the ordinary hath sufficient authority to decree a removal without any danger of an action at law (Gibson's Cod., 544.) In *Seager v. Bowle*, 1 Adams, 553, it was contended that if monuments are regularly set up with the leave of the minister singly, the ordinary has power to remove only in the event of their proving nuisances or incumbrances, but from the decree in that case, it would seem that no practice can absolutely legalize the erection of a monument without a faculty.

Ornaments can be hung up in the church without the leave of the rector; but when private individuals hang up black cloth in a church with the concurrence of the rector, from respect to the memory of some person deceased, the rector has no right to take any portion of the cloth, unless there was some agreement to that effect by the parties to whom the property belonged. (*Cramp and Another v. Bayley coram, Bayley, J., Kent Lent Assizes, 1819, cited Degge's Pars. Counsel, 218, 7th ed.*) Though the *heir* has a property in the monuments and escutcheons of his ancestors, and may bring an action against those who take them or deface them; *text supra. Co. Litt. 18 b, Gibs. Cod., 544; Frances v. Ley, Cro. Jac. 387; May v. Gilbert, 2 Bulstr., 151, Vin. Ab. Descent, E;* yet he has none in their bodies and

ashes; nor can he bring any civil action against such as indecently violate and disturb their remains when dead and buried (2 Black. Comm. 429). But the property of the shroud remains in the executor or other person who was at the charge of the funeral, and a stealing of it will be felony. *Hayne's Case*, post. fo. 113, 1 H. P. C., 515, 2 Black. Comm., 429, 1 Hakw. P. C., cap. 53, § 46, 2 East. P. C., cap. 16, § 89."

In the matter of the Brick Church (3 Edward's Chy., 168), the court said, "A faculty or grant from the bishop will authorize the erection of tombs and monuments. The person who sets them up has a right of action for injuring or defacing them during his life; and the *heir* of the deceased has a like right of action. The heir has a right of property in the monuments and escutcheons of his ancestors, and may bring an action against those who take or deface them."

It will thus be seen that the courts held the widow who had erected a monument to the memory of her husband can maintain an action against one who injures or destroys it. Her right to maintain the action seems to depend not upon the fact that she is the widow, but, in the language of Blackstone (before cited) upon the ground that "the property thereof remains in the executor or whoever was at the charge of the funeral." In other words, she may recover because having once purchased and paid for the monument it is her property during her life. Immediately upon her death, however, it passes not to her representative or heir but to the *heir of the deceased*. It would seem then, upon principle, that in a contest between the widow and the heir the right to select and control the place of burial of the deceased should belong to the heir for the reasons:

1. While no one has, in a technical sense, property in the remains of a deceased person, yet if the heir inter them in his own grounds, in an action for trespass *quare clausum fregit* against one who should enter and disturb the remains, the gravamen of the action being the breaking and entry of his close (*Van Leuven v. Lyke, 1 N. Y., 515; Hall v. Hodskins, 30 How. Prac., 27; Duncel v. Kocker, 11 Barb., 387;*

Reed v. Edwards, 17 C. B., N.S., 245, 112 Eng. Com. Law Rep.,) the jury by way of punishing the wrongdoer would have the right to give punitive damages (*Adams v. Rivers*, 11 Barb., 398; *Merest v. Harcey*, 5 Taunt., 442; *Cook v. Ellis*, 6 Hill, 465; *Hitchcock v. Whitney*, 4 Denio, 461,) and thus protect the heir in the undisturbed possession of the remains.

2. The title to a monument erected over the remains of a deceased person, as before shown, passes to the heir even though purchased by a stranger, certainly upon the death of the latter. If, however, the monument stand upon the lands of a stranger he could, without injuring the monument, disinter the remains and secretly remove them to an unknown place and the heir would be remediless.

3. If the monument stand upon the lands of the widow there is great doubt whether title thereto would not, upon her death, pass to her heir as appurtenant to the land: (*Snedeker v. Warring*, 13 N. Y. Rep., 170).

4. Should the widow die the day after interring the remains upon her own lands, the title to the lands would pass to strangers in blood to the deceased, who would not be liable, to his heir or to any other person, in an action for plowing over the remains or treating them ever so inhumanly: (*Winters v. The State*, 9 Indiana, 172).

5. Should there be no monument or other heir-loom over the remains, the heirs of the deceased could have no action whatever against the owner of the soil for the grossest indignity to the remains.

6. The owner of the land would have no interest or motive in protecting the remains or beautifying and preserving the grave or monument.

7. The heirs and relatives of the deceased would have no right to enter upon the lands where the remains were interred to do so. They would be trespassers in entering to remove the body or even visiting the place of its interment.

8. They could not punish a wrongdoer by maintaining trespass *quare clausum* against him.

9. Should the widow again marry and have, as was said in one reported case (*Lawall v. Kerdler*, 3 Rawle, 304),

three husbands, the remains of the first husband instead of being interred with those of his kinsmen might be surrounded with those of a couple of successors to the affections of his "dear" spouse and their numerous progeny. Imagine the feelings of his children on visiting his grave under such circumstances.

Thus stands the question upon principle. The few cases bearing upon the question are in entire harmony therewith. In the matter of widening Beekman street (4 Bradford, Surr. Rep., 503-532), Hon. S. B. Ruggles, referee, after an elaborate review of the law of burial arrived at the following conclusions:

"1. That neither a corpse, nor its burial, is legally subject in any way, to ecclesiastical cognizance, nor to sacerdotal power of any kind.

2. That the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect.

3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.

4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.

5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reintering their remains."

This report was subsequently confirmed by the Supreme Court, thus receiving the sanction of judicial authority.

Mr. Bishop seems to be of the same opinion (1 Bishop's Mar. & Div. (5th ed.), § 565, note 5).

In the case of *Wynkoop v. Wynkoop* (42 Penn. State Rep., 298), cited by Mr. Bishop, the remains of Col. Wynkoop, of the Mexican war, who died from an accidental gunshot wound, were buried in a lot belonging to his mother, in Mount Laurel Cemetery, at Pottsville, Pennsylvania. His widow yielded assent to such burial, with the understanding, as she claimed, that the body might afterwards be removed to Laurel Hill Cemetery, near Philadelphia. Sometime after such burial, the

1874

In re Bettison.

widow, without holding any communication on the subject with the relatives of her deceased husband, made arrangements for the removal of the body to Philadelphia. The relatives prevented such removal, and the wife filed her bill of complaint, in which, after setting out that Col. Wynkoop expressed a desire in his lifetime to be buried, after his death, at Laurel Hill Cemetery, near the monument or cenotaph there erected to the memory of her father, Major Twiggs. That immediately after the death of her husband, his sister and two brothers arrived at her residence and entreated her to allow the deceased to be buried at Pottsville, which she refused to do, in consequence of the expressed wish of her husband, in his lifetime, to be buried at Laurel Hill, near Philadelphia, which they met by the difficulty in making the arrangements for the funeral in Philadelphia. That, after a long controversy, in order to overcome the objections of complainant to the burial of deceased in Pottsville, they assured her that she should be permitted to remove the remains of said deceased to Philadelphia whenever she pleased to do so, provided she made no further opposition to the burial in Pottsville. That the relatives of deceased pledged their honor to this effect, and that they would assist complainant in the removal of said remains, and took a solemn oath, standing by the side of the corpse, to the same purport. That the mother of deceased, who subsequently arrived, promised to the same effect. That, in accordance with such promises, the remains of Col. Wynkoop were temporarily interred in the lot in Mount Laurel Cemetery in Pottsville, of which the mother of deceased held title.

That, notwithstanding the assurances of the relatives of the deceased husband, complainant believed that those of them who were made defendants to the bill were combining, confederating, and contriving to wrong her by refusing to allow her to remove said remains, and that she believed that any further attempt on her part to remove the body of her deceased husband would be forcibly resisted. That, as widow and administratrix of her deceased husband, she has the legal right to remove his remains to Laurel Hill Cemetery, near Philadelphia.

After praying that defendants be required to answer all matters set forth in the bill, she prayed that the court would, by injunction, restrain the defendants, either directly or indirectly, by legal process or otherwise, from preventing the complainant in the removal of said remains, and that she might, by herself or her agents, have full ingress, egress, and regress to and from said lot of ground for that purpose. After answer and the taking of testimony, the court granted the relief asked for by the plaintiff, and the defendants removed the case into the Supreme Court. That court reversed the judgment of the Court of Common Pleas of Schuylkill county, saying (42 Penn. State Rep., 300-3): "So universal is the right of sepulture that the common law, as it seems, casts the duty of providing it, and of conveying to the grave, the dead body, decently covered, upon the person under whose roof the death takes place; for such person cannot keep the body unburied nor do anything which prevents christian burial; he cannot, therefore, cast it out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and, for the same reason, he cannot carry the dead body uncovered to the grave (*Reg. v. Stewart*, 12 Ad. & Ellis, 773, 40 E. C. L. R.) The executor or administrator must bury the deceased in a manner suitable to the estate he leaves behind him, and such funeral expenses are placed, by the act of assembly, in the first class of preferred debts. Where the body is decently and properly buried in an appropriate place, such as a family vault, or a burial lot in a church-yard, in or near the neighborhood of the residence of the decedent, it would seem that all was performed which the law required from the living. The duty of the executor or administrator is over, and also his rights, except in case of an improper interference with the grave, the body, or the grave clothes of the deceased. The claims of society have been entirely satisfied. It is of rare occurrence that any dispute arises, after the burial, or that any case has been submitted to the court for its decision. The law of burial, in its relation to the place of interment, and the protection of the dead body was discussed at great

length by the Hon. Samuel B. Ruggles, in a very learned report to the Supreme Court of New York, in the matter of the widening of Beekman street, which took away certain vaults for the burial of the dead, and required the disinterment and reinterment in some other place, of the dead bodies contained in them. Besides the vaults, the bodies contained in eighty graves, amounting to about one hundred, were all disturbed and removed by the church. In one of the graves lay the body of Moses Sherwood, indicated by a marble headstone, bearing the name of "Sherwood." His daughter, Maria Smith, acting for herself and her sister, and for the descendants of her brothers and sisters, five in all, who had died, claimed that the remains of her father be reinterred in a separate grave, in such suitable locality as she might select; that the existing monument be erected over such grave, and that the necessary expense be defrayed out of the funds in court. The referee was of opinion that the claim should be allowed, and submitted to the court certain conclusions, of which the 2d and 3d were as follows: '2. That the right to bury a corpse and to preserve its remains, is a legal right which the courts of law will recognize and protect. 3. That such right, in the presence of any testamentary disposition, belongs *exclusively* to the *next of kin*.'

After hearing counsel upon the report the court confirmed it in all respects, awarding \$100 to Maria Smith, as *next of kin* of Moses Sherwood, directing her with that sum to re-inter his remains, and erect at his grave the monument taken in widening the street, and declaring her *entitled to the possession of the remains and of the monument for that purpose*: 4 Bradford's Reports, Appendix, 503, 532.

Col. Francis M. Wynkoop died suddenly, from an accidental gunshot wound, at his residence at Valencia, Schuylkill Co., Penn., on Sunday the 18th day of Sept., 1857, and was buried in the course of the week in the burial lot of his mother, Angelina C. Wynkoop, in the Mount Laurel Cemetery, belonging to the rector, churchwardens, and vestrymen of Trinity Church, Pottsville, in the said borough of Potts-

ville, with military honors, the deceased having served in Mexico in command of a volunteer regiment principally raised in Schuylkill Co. Some days afterwards his widow took out letters of administration in Schuylkill Co. upon her husband's estate. On the 10th of November, 1858, in pursuance of the orders of his widow, the complainant and undertaker called on one of the church-wardens for the key of the cemetery, in order to take up and remove the remains of her husband to Laurel Hill Cemetery, near Philadelphia, which was refused in consequence of a notice from the mother and next of kin of the decedent, and in whose lot he was buried.

On the 30th day of the same month, the widow, in her own right, and as administratrix, filed a bill in equity in the Court of Common Pleas of Schuylkill Co., against Angelina C. Wynkoop (the mother), John E. Wynkoop (a brother), Anna M. Wynkoop (a sister), Thomas J. Atwood and the rector, church-wardens and vestrymen of Trinity Church, Pottsville, praying an injunction commanding the mother and the said corporation to permit the plaintiff and her agents to remove the body of the deceased. Upon the hearing, on bill, answers and proofs, the court below decreed that an injunction be issued, according to the prayer of the plaintiff against the defendants, from which an appeal was taken by the mother, Angelina C. Wynkoop.

The bill asserts a fixed legal right in the plaintiff in two capacities: 1st, as administratrix, 2d, as widow. As to the first, the absolute duty to bury terminated with the burial, and no subsequent expenses would be a legal charge upon the estate of the decedent, whether solvent or insolvent. 2. As widow, she would appear in this case to have no rights after the interment. Suppose a widow has had three husbands, who have all died, leaving her a widow (3 Rawle, 304), is she to be burdened with the duty and vested with the charge of their three bodies against the express wishes of the blood relations and next kin of each?

But it is said there was an agreement, or promise made by all, or some of the relatives of Col. Wynkoop to the plain-

tiff, where she was evidently laboring under great mental excitement, almost amounting to insanity, in order, as it would appear, to restore her to a state of comparative calmness. The appellant, in her answer, says: 'Said complainant asserted that the body of said John Wynkoop should never be buried at all, but that it ever should remain with her.' Her nerves were wrought up to the highest state of excitement, and consequently her reason, for the time, was almost shattered. The appellant most positively denies that she ever made any such promise or agreement, and the evidence in the cause does not prove her positive and unqualified assertion to be untrue. This ground therefore fails, and the right of the appellant is founded upon her *position as mother and next of kin*. Besides the fact that the body of her son is deposited in her burial place, in consecrated ground, and that he was buried with the ceremonies of the church and with the honors of war, is sufficient to justify us in refusing permission to a removal under the circumstances.

We do not think the present case calls for the interference of a court of equity, and therefore :

It is ordered, adjudged, and decreed that the decree of the Common Pleas of Schuylkill Co. be reversed and the bill be dismissed."

Mr. Tyler says (Ecclesiastical Law, section 971): "The right to bury a corpse and to preserve its remains, is one which the courts of law will recognize and protect, and in the absence of testamentary disposition, belongs *exclusively* to the *next of kin*. The right to protect the remains, includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure. The right to the mere repose of a grave, although intangible or invisible, is nevertheless property. The right to the individuality of a grave continues as long as the remains of the occupant can be identified (*Matter of Brick Presbyterian Church*, 4 Bradford, 508). The bodies of the dead belong to the surviving relations to be disposed of as they may deem fit, but subject to such burial regulations as are reasonable and proper for the public health and ad-

vantage (*Bogert v. Indianapolis*, 13 Ind., 134").

In the case of *Bogert v. Indianapolis* (13 Ind., 138), the court said, "But we lay down the proposition, that the bodies of the dead belong to the surviving relations, in the order of *inheritance*, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated."

In the case of *Pierce and wife against Swan Point Cemetery and Metcalf* (10 Rhode Island, 227, 14 Am. Rep., 667, 5 Am. Law Times, Rep., 153), Mrs. Pierce was the only child and heir-at-law of Whiting Metcalf, deceased, and Mrs. Metcalf, one of the defendants, was his widow. The widow had, after burial, removed the remains of her husband, and the plaintiffs brought suit to compel her to restore them. The court granted the relief asked for, among other things saying, "The question is new in this state; and we do not know that it has ever occurred in our mother country, and but seldom in the United States. That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind, to be discharged by some one, towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation; it may therefore be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such a case. It is common to speak of the *right of burial*; of a person's *right* to be buried, &c. In the case of *Reg. v. Stewart* (12 Adolph. & Ellis, 773), the court say, 'Every person dying in this country * * * has a *right* to Christian burial; and that implies the right to be carried from the place where the body lies to the parish cemetery.'

In *Gilbert v. Buzzard* (1 Hagg. Const., 348; 3 Phill. 335), Lord Stowell says, 'The rule of law which says that a man has a right to be buried in his

own church-yard is to be found most certainly in many of our authoritative textwriters; but it is not quite so easy to find the rule which gives him the right of burying a large chest or trunk in company with himself. That is no part of his original and absolute right, nor is it necessarily involved in it. That right strictly taken, is to be returned to his parent earth for dissolution, and to be carried thither in a decent and inoffensive manner. When these purposes are answered his rights are perhaps fully satisfied in the strict sense in which any claim in the nature of an absolute right can be deemed to extend.' So Dr. Burn, quoting Gibson's *Codex Juris Ecclesiæ Anglicanæ*, says: 'Every parishoner bath and had always a right to be buried in the parish burial ground.' 1 Burn's Ecc. Law, 257.

Most people look forward to the proper disposition of their remains, and it is natural that they should feel an anxiety on the subject. And the right of a person to provide by will for the disposition of his body has been generally recognized. We have seen that by the canon law a person had a right to direct the place of his sepulture, 3 Voet ad Pand., Paris ed. 1818, p. 378. Now, strictly speaking, according to the strict rules of the old common law a dead man cannot be said to have rights. Yet it is common so to speak, and the very fact of the common use of such language, and of its being used in such cases as we have quoted, justifies us in speaking of it as a right in a certain qualified sense, and of a right which ought to be protected. * * It has been the boast of many of the sages of the law that there is no wrong without a remedy. Says Lord Coke (Coke Lit. 197 b.; 1 Thomas's Coke, 902), 'The law wills that in every case where a man is wronged and endangered he shall have a remedy.' Lord Holt in *Ashby v. White*: 'If the plaintiff has a right, he must of necessity have a right to vindicate and maintain it. * * It is a vain thing to imagine a right without a remedy.' Lord Ray., 938; S. C., 6 Mod. 45: * * And the late Chief Justice Ames has well expressed it in his opinion in the case of *Reynolds v. Hozie*, 6 R.I., 463, 468, that it is perfectly understood that there cannot be a wrong under our jurisprudence for

which the law does not in some form provide a remedy. * * The very origin of equity in Rome and in England was that there was a wrong for which there was no remedy, or no adequate remedy at law. 1 Sto. Eq. Jur., §§ 49, 50. And we cannot but approve the language of Lord Cottenham in *Walworth v. Holt*, 4 Myl. & Cr., 619: 'I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society: and not by too strict an adherence to forms and rules established under different circumstances to administer justice and enforce rights for which there is no other remedy. * * If it were necessary to go much further than it is in opposition to some highly sanctioned opinions, in order to open the door of justice in this court to those who cannot obtain it elsewhere, I should not shrink from the responsibility of doing so.' Quoted in Sto. Eq. Jur., § 671 note.

In *Kurtz v. Beattie*, (2 Peters, 586, 584), which was to obtain an injunction to prevent the removal of tombs and graves, Judge Story in giving the opinion of the United States Supreme Court, says: 'It is a case where no action at law could afford an adequate and complete remedy. * * The remedy must be sought, if it all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead and the religious sensibilities of the living.'

In cases like the present no common law action could avail much. The owner of the lot might have trespass *quare clausum*, &c., but he could only recover damages in money. He might have an action of detinue for the body, or so much earth, &c., taken away: or perhaps might have replevin; if buried by permission on another's land, it might perhaps be considered a license or easement, for disturbance of which the person who procured the burial might have an action; but it is easy to see that neither form of action affords a sufficient remedy, or could with any certainty restore the body to its proper custody.

Equity only can give a full and complete remedy, and we think the jurisdiction is fully adequate to it.

It seems the deceased, Mr. Metcalf, purchased a burial lot, and was, on his decease, with the consent of his wid-

1874

In re Bettison.

ow, one of the respondents, and the complainants say they believe according to his own wishes, buried in it. The respondent, Mrs. Metcalf, has demurred to the bill thus admitting these alleged facts, for the purposes of the present hearing. Taking these allegations as uncontradicted and true, as the body was removed by the widow, without the consent of the child, from a place where it was deposited by his own wishes and her consent, we think it should be restored to the place whence it came."

That equity has jurisdiction to protect the burial of the remains of deceased persons was held in *Trustees, etc., v. Walsh*, 57 Illinois, 383.

In the matter of Stephen Girard's remains (5 Penn. Law Jour. Rep., 68, 4 Am. Law Jour., 97), the remains of Stephen Girard after being interred were exhumed by the authorities of the city of Philadelphia, with a design to deposit them with imposing public ceremonies at the Girard College. On the motion by the executors for a preliminary injunction to restrain such action by the city authorities, and to compel them to restore the body to its former place of burial, the court said, *In re King* (5 Penn. Law Jour. Rep., pp. 73-4), "The question involved in the case was of more than ordinary interest. No analogous case could be found in the English or American annals. Is there not that in our laws which guaranties the security of sepulchre? If any person in mere wantonness should break into the grave, and take away the body, the criminal law would furnish a remedy. And it would even act in a preventive manner. In cases like the present, however, the law has furnished no remedy.

It is proper, therefore, that a court of chancery should provide a remedy. Where a person was buried in a common burying ground, where the title did not pass, the law did not furnish a remedy in reference to a removal; but a Chancellor would intervene, to prevent the desecration of the grave, otherwise bloodshed and violence would be the consequence. If I had been applied to before the removal of the body, I would have interfered. But this is not the case here. The city claims as the residuary legatee, and her mo-

tive was to indicate respect and honor for the memory of the man.

If the executors chose to disclaim it, they might have done so, if they were executors, but if they disclaimed the *relatives might be parties alone*. In all these respects a court of equity could interfere. But the body has been removed and the relatives had a knowledge of it. Even here the court can interfere; but ordering the body back to its former place would be deciding the case. We are not asked to do this now. It would be deciding the case before a hearing. This a court never does in granting a special injunction. The body must be placed temporarily in some respectable resting place. Where so proper a place as in the sarcophagus at Girard College, instead of the garret where it now is? The final decision of this case, from its nature, cannot be given under six or nine months, and then an appeal lies to the Supreme Court. How much better then to have it deposited in the place contemplated than to have it a weight upon the community. This appears to have been agreed upon by both parties. The difficulty, however, appears to be about the ceremony. Some persons must deposit the body, as it is to be deposited, and what difference does it make whether few or many attend the interment? or whether the masons or any other body attend? No religious ceremonies are in contemplation. He would therefore refuse the special injunction to the extent prayed for, and suffer the city to proceed to inter the body temporarily, until its final resting place should be determined by the court." It is true the case is but a *nisi prius* case and was hastily decided. The court however held: 1. As a court of equity it could and did control the disposition of the body and who should have the control and burial thereof.

2. That in the absence of executors,—as where there were none, or there being executors they disclaimed connection with the suit, the court would proceed upon the application of the relatives alone.

In *The Church v. The Church* (3 Brewster's Pa., 372), it was held that "The removal of the remains of persons interred in a burial ground, with-

out the consent of their families, will be enjoined at the suit of such families as have the right to inter in said grounds."

See Laws N. Y. 1842, p. 259, chap. 215; *Rosseau v. City of Troy*, 49 How. Prac. Rep., 492.

The reason and origin of the rule that the heir or next of kin, instead of the widow, has a right to designate the place of burial and control it, is explained by Prof. James Parsons in his "Legal Topics," title "The Ancient Commonwealth," p. 123, reprinted from 11 Am. Law Reg., N. S., 465.

It can be traced back through the ecclesiastical to the Roman law, by which the duty of burial devolved upon the males of the family for its honor. Women, except vestal virgins, were by that law in perpetual tutelage: Sander's Justinian, Lib. 2, tit. 1, § 9; Id., p. 8, Am. ed.; Maine's Ancient Law (3d Am. ed.), p. 142 *et seq.*; Gaius, Book 1, §§ 55-115, 136, 148-200, and see Poste's notes; 1 Domat's Civil Law (Cushing's ed.), §§ 101, 102; 2 Id., §§ 2651-2657.

See also "The Roman Cemetery of Urconium at Wroxetre Salop," By Prof. Thomas Wright; 1 Intellectual Observer, 33, 36.

Lands may be dedicated to pious and charitable uses—as to the inhabitants of a town for a burying ground: *Hunter v. Trustees*, 6 Hill, 407, 411 Willard's Conv., 226; *Cincinnati v. White's Lessee*, 6 Peters, 431; *Hullman v. Honcomp*, 5 Ohio St. Rep., 237; *Buffalo, etc., v. Buffalo*, 46 N. Y., 503.

See *Seymour v. Page*, 83 Conn., 61.

In such cases the owner cannot maintain ejectment for the lands or any part of them, even though the town has removed the bodies from a small strip and uses that for a highway: *Hunter v. Trustees*, 6 Hill, 407; *First, etc., v. Second, etc.*, 2 Brewster, 312; *Kincaid's Appeal*, 66 Penn. St. R., 411.

And may be restrained, on application of the corporation, without joining the lot owners: *Beatty v. Kurtz*, 2 Peters, 566.

See *Hamilton v. New Albany*, 30 Ind., 482.

A bankrupt's interest in a vault does not pass to his assignee: *Matter of Ely*, 1 N. Y. Leg. Obs., 131.

The mortgagee of a burial ground has notice of the purposes to which it

is devoted, and is bound by rights of burial, temporary or in perpetuity, granted by his mortgagor while left in possession: *Moreland v. Richardson*, 24 Beavan, 83.

A church society may sell its churchyard, as distinguished from a separate independent cemetery, even as against the heirs of one to whom it has conveyed a burial right in a vault. Such conveyance is a mere easement. It must, however, provide a suitable and proper place of interment for the remains of such as have been placed in the vault, and cause such removal and burial at its own expense: *Richards v. Northurst, etc.*, 11 Abb. Prac., 30, 20 How. Prac., 317, 32 Barb., 42; *Part-ridge v. First, etc.*, 39 Maryland, 631; *Kincaid's Appeal*, 66 Penn. St. R., 411; *Price v. Methodist, etc.*, 4 Ohio, 515; *Windt v. German, etc.*, 4 Sandf. Chy., 471; *Sohier v. Trinity Church*, 109 Mass., 22; Washb. on Easements (2d ed.), 604, marg. p. 515; *Viele v. Osgood*, 8 Barb., 130.

See, however, *Matter Brick, etc.*, 3 Edw. Chy., 155; disapproved in *Richards v. North West, etc.*, 11 Abb. Prac., 39; Laws N. Y., 1842, p. 259, chap. 215; *Rosseau v. City of Troy*, 49 How. Prac., 492; *Adam v. Collhurst*, L. R., 2 Adm. and Ecc., 30.

The lot owner has the right to remove the remains and all monuments and other erections over the same: *Part-ridge v. First, etc.*, 39 Maryland, 631.

And it has been held that the owner of a lot in a cemetery has the right to bury therein the remains of whomsoever he pleases. He cannot be restrained from burying the remains of a colored man. The by-law of the company forbidding such a burial is arbitrary and unreasonable: *Boileau v. Cemetery Co.*, 2 Weekly Notes of Cases, 244, Com. Pleas, Philadelphia.

This case may also be consulted with profit as to the right of a grantee to transfer his interest in a cemetery lot without the consent of the association. It was held a mandamus would lie to compel the association to permit a burial. The case was affirmed, on appeal, by the Supreme Court, 2 Weekly Notes of Cases, 511.

In this case, however, the deed of the lot was dated April 16, 1875, and conveyed the lot to Boileau, a colored man. The by-law was not adopted till June

1874

In re Bettison.

90, 1875. It may well be doubted whether if the by-law had been in force at the time of the transfer and the conveyance to a white person or to one not known to the association to be a colored person, the grantee would not have taken the deed subject to the by-laws. While the march of public sentiment has justly obliterated much of the former prejudice against the colored race, we can see no reason why a cemetery association may not adopt any regulations it pleases as to the terms and conditions on which transfers of lots shall be made, and why an acceptance of a conveyance subject thereto is not binding upon the grantee. The decision of the Supreme Court proceeds upon this ground.

The grantee of a lot in a cemetery has a right therein of which he cannot be deprived by the association: *Meagher v. Driscoll*, 99 Mass., 281; *Church v. Church*, 2 Brewster, 372.

See Laws N. Y. 1842, p. 259, chap. 215; *Rosseau v. The City of Troy*, 49 How. Prac., 492.

The purchaser of a lot in a cemetery for "burial purposes" does not take any title to the soil; and an act of the legislature directing the vacation and sale of the cemetery and the removal of the bodies, is not an unconstitutional infringement of his rights: *Kincaid's Appeal*, 66 Penn. St. R., 441, 14 Am. Rep., 377; *Partridge v. First, etc.*, 39 Maryland, 631.

A husband has the right to bury the remains of his deceased wife and may maintain a civil action against any one who interferes with his right to do so by improperly mutilating the same, though delivered for post mortem: 4 Albany Law Jour., 56, 4 Am. Law Times, 127-9, 3 Chicago Leg. News, 378.

An injunction lies by the owner of a lot in a cemetery to prevent the removal of a body buried therein or of the gravestones: *Moreland v. Richardson*, 22 Beavan, 596; 2 Story's Eq. Jur., § 959 c.

As to action for injuries to tombstones: see *Spooner v. Brewster*, 3 Bing., 136; Coke's Litt., 18, b, Coke, Ch. J.; *May v. Gilbert*, 2 Bulstr., 151; *Francis v. Ley Croke*, James, 367; *Cowen's Case*, 12 Coke, 105, and note C.

A cemetery lot purchased with the funds of an estate is the joint property of the heirs for the purposes of sepul-

ture. G.'s administratrix and widow purchased with the funds of his estate a cemetery lot, took the title in her own name, and refused to execute a declaration of trust, in favor of G.'s children by a former wife, recognizing their rights to bury in it. Held that equity would compel the administratrix to execute such a declaration. Held further that the bill filed by certain of G.'s children was not defective for want of proper parties because all G.'s minor children were not joined: *Stewart's Appeal*, 2 Weekly Notes of Cases, 422, affirming S.C., 1 id., 88.

A trust to build, maintain and keep in repair tombs, vaults and burying grounds of the donor, his family or parish, is so far charitable that it will be carried into effect: 2 Perry on Trusts, § 760; *Lloyd v. Lloyd*, 2 Simons', N. S., 255; 10 Eng. L. and Eq. Rep., 139; *Dexter v. Gardner*, 7 Allen, 247; *Swasey v. American, etc.*, 57 Maine, 527.

See *Moncrief v. Ross*, 50 N. Y., 434; 10 Eng. Rep., 733 note; *Brown v. Harris*, 25 Barbour, 134; *Hullman v. Honcomp*, 5 Ohio St. R., 237; *Yeap, etc.*, v. *Ong, etc.*, L. R., 6 Priv. C. C., 381, 395-6, to appear in 13 Eng. Rep.

A bequest of an annual sum for repairs upon a monument has been held good: 2 Perry on Trusts, § 760; *Wiles v. Brown*, 2 Jurist, 987.

Such bequests will be enforced as against the heir: *Gravener v. Hallum*, Ambler, 643.

An administrator is liable personally for his contracts for the expenses of the funeral of his intestate, and so of any contract made by him; a succeeding administrator is not liable, as such, upon such contracts: *Patterson v. Patterson*, 59 N. Y., 514, modifying 1 Hun, 323; *Ferries v. Myrick*, 41 N. Y., 315, reversing 53 Barb., 77; *Mygatt v. Wilcox*, 45 N. Y., 306; *Austin v. Munroe*, 47 N. Y., 380; *Bloodgood v. Sears*, 64 Barb., 71; *Bowman v. Tallman*, 3 Rob., 385, affirmed 41 N. Y., 619; *Wilcox v. Smith*, 26 Barb., 316; *Labouchere v. Tupper*, 11 Moore P. C., 193.

See *Davis v. Stone*, 58 N. Y., 473; *Robinson v. Hersey*, 60 Maine, 225; *Pierce v. Proprietors*, 10 Rhode Island, 238 note; S. C., 14 Am. Rep., 667; *Porter's Estate*, 77 Penn. St. R., 43; *Magennt's v. Dempsey*, Irish Law Rep., 3 Com. Law, 327.

Where a third person pays the expenses of burial the representative is liable to him therefor: *Patterson v. Patterson*, 59 N. Y., 574.

But the complaint must allege that such expenses were suitable to the circumstances of the deceased, that the latter left sufficient assets and that the representative promised to pay them; such promise will, however, be implied in a proper case: *Magennis v. Dempsey*, Irish Law Rep., 3 C. L., 329, 338.

As to city ordinances prescribing the limits and mode of interment, see *Com. v. Fahey*, 5 Cush., 408; *City, etc., v. Baptist, etc.*, 4 Strobhart (S.C.), 306; *Bogert v. Indianapolis*, 13 Indiana, 134; *Lake, etc., v. Letz*, 44 Illinois, 81; *Sohier v. Trinity, etc.*, 109 Mass., 109.

As to plowing over graves of those buried upon a farm sold: see *Winters v. The State*, 9 Indiana, 172.

As to restraining burials, as a nuisance: *Ellison v. Comrs.*, 5 Jones (N.C.) Eq., 57; *Sohier v. Trinity Church*, 109 Mass., 21; *Clark v. Lawrence*, 6 Jones' Eq., 83; *Barnes v. Hathorn*, 54 Maine, 124.

One who disinters a dead body for the purposes of dissection, and also one who feloniously receives it knowing it to have been so disinterred, is liable to indictment therefor. The identity of the remains may be shown by circumstances: *People v. Graves*, 5 Parker's Crim. R., 134; *State v. Ringer*, 6 Blackford (Ind.), 109; 1 Wheeler's Crim. Cases, 491 note.

See 1 Burns's Justice (30th ed.), 467, title Bodies, Dead; *McName v. People*, 31 Michigan, 473; *Com. v. Cooley*, 10 Pick., 37; *Com. v. Marshall*, 11 Pick., 350; *Com. v. Loring*, 8 Pick. 370; *Tate v. State*, 6 Blackford, 111; *State v. McClure*, 4 Blackford, 328; *Com. v. Slack*, 19 Pick., 304.

In England what is called a faculty, allowing the disinterment of a corpse, may be granted by the ecclesiastical court: *Matter of Pope*, 5 Eng. Law and Eq. R., 585.

To cast a dead body into a river without the rites of christian sepulture, is indictable as an offence against common decency: *Kanavan's Case*, 1 Maine, 226; *Pierce v. Proprietors*, 10 Rhode Island, 236, S. C., 14 Am. Rep., 667; *Regina v. Stewart*, 12 Adolphus & Ellis, 773, 40 Eng. C. L. Rep.

It is a misdemeanor at common law

to remove, without lawful authority, a corpse from a grave in a burying ground belonging to a congregation of protestant dissenters; and it is not defence to such a charge that the motive of the person removing the body was pious and laudable: *Regina v. Sharpe*, Dearsly & Bell C. C., 160, 7 Cox, 214, 40 Eng. Law and Eq., 581; S. P., *State v. McClure*, 4 Blackford (Ind.), 328; *State v. Ringer*, 6 Blackford, 109; *Regina v. Twiss*, 10 Best & Smith, 298.

See *Hamilton v. New Albany*, 30 Ind., 482.

The defendant was convicted on an indictment charging him with disposing of certain dead bodies for the purposes of dissection. The defendant, the master of a workhouse, was a person having lawful possession of the bodies of deceased paupers; and under section 7 of the Anatomy Act (2 & 3 William IV, c. 75), it was lawful for him to permit such bodies to undergo anatomical examination, provided the relatives did not require them to be buried without such examination. For the purpose of preventing the relatives from making this requirement and leading them to suppose that the bodies were buried without dissection, the defendant showed the bodies, in coffins, to the relatives and caused the appearance of a funeral to be gone through. This fraud prevented the relatives from making the requirement, and the defendant for gain to himself disposed of the bodies for dissection. Held, that the statutory requirement not having in fact been made, the defendant was not liable, in consequence of the 7th section of the Anatomy Act, for what he did, and the conviction was wrong: *Regina v. Feist*, Dearsly & Bell's C. C., 590, 8 Cox Cr. Cas., 18.

For form of indictment, see 7 Cox's Cr. Cas., Appendix, p. LVII.

To sell the dead body of a capital convict, for dissection, where dissection is no part of the sentence, is a misdemeanor at common law. Indictment "that one E. L. was publicly executed, at, &c., and that one G. C. of, &c., undertaker, was retained and employed by W. W., the keeper of the gaol in and for the said county, to bury the body of the said person so executed, for certain reward to be therefor paid to the said G. C. by and on behalf of the said county and in pursuance of

1874

In re Bettison

the said retainer and employment, the body of the said person so executed was then and there delivered to the said G. C. for the purpose of being so by him buried as aforesaid, and it then and there became the duty of the said G. C. to bury the same accordingly, but that the said G. C. being, &c., and having no regard to his said duty, nor to, &c., did not nor would bury the said body, but on the contrary thereof unlawfully, &c., and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same, for the purpose of being dissected, &c., to the great scandal," &c.: Held that the indictment was well framed, though apparently drawn in the language of a declaration in assumpsit: Held, also, that to support the indictment, it was not necessary that there should be direct evidence that the defendant had sold the body for lucre and gain, and for the purpose of being dissected: *The King v. Cundick*, Dowling & Ryland's N. P., 13.

In New York provision is made by statute for the delivery, in certain cases, of the remains of persons dying without friends, to professors and teachers in medical colleges: Laws N. Y. 1854, p. 282, chap. 123, 3 Edm. St. at Large, 717.

The offence of wantonly disinterring dead bodies, etc., is made a felony: 2 R. S., 688, §§ 13, 14, 15, 2 Edm. St., 710.

An executor or administrator is liable to a stranger for the proper burial of the testator or intestate, if he die among strangers, but not for mere gratuitous services or acts: *Hewett v. Bronson*, 5 Daly, 1.

Where one sent a corpse in casket, inclosed in a rough box, by express, C. O. D., for the casket and undertaker's charge, and the consignee after obtaining the box under a promise to pay the charges, took the corpse out, returned the casket and refused to pay the charges. The shipper sued the express company for delivering the box without payment of the amount of the C. O. D. Held the consignee had the right to open the box to ascertain its contents before he was bound to accept it. That the consignor had no lien on the corpse for the price of the casket or for the undertaker's

charges, and was entitled to recover of the express company: *Epply v. Am. Exp. Co.*, 3 Wash. Law Rep., 93.

A friend of deceased who sends his remains to relatives, by a carrier, cannot maintain an action against the carrier for a failure to carry them: *Driscoll v. Nichols*, 5 Gray, 481.

[Law Reports, 6 Privy Council Cases, 157.]

J.C. (1), June 27, 30; July 1, 2, 4, 7, 8; Nov. 21, 1874.

DAME HENRIETTE BROWN, Appellant; and LES CURE ET MARGUILLIERS DE L'ECUVE ET FABRIQUE DE NOTRE DAME DE MONTREAL, Respondents.

On appeal from the Court of Queen's Bench for the Province of Quebec in the Dominion of Canada (appeal side).

Status of the Roman Catholic Church in Lower Canada—Ecclesiastical Burial—Practice—Mandamus—Recusatio judicis.

Joseph Guibord, a lay Roman Catholic parishioner of Montreal, on the 18th of November, 1869, died, a member of the "*Institut Canadien*," a literary society which had incurred ecclesiastical censures. In his lifetime a pastoral letter of the Bishop of Montreal had forbidden such membership on pain of being deprived of the Sacrament "*même à l'article de la mort*." During illness the priest who administered unction had refused to administer Holy Communion; and at his death six years thereafter the curé of Montreal, under the direction of the bishop, refused "*la sépulture ecclésiastique*," after request duly made in that behalf; that is to say, the said curé refused burial in the larger part of the local cemetery, in which Roman Catholics are usually buried with the rites of the church, and in which the graves are consecrated; but he offered burial without rites in the smaller or reserved part, in which the graves are never consecrated, and in which are buried unbaptized infants, criminals, and those who have died "*sans les secours ou les sacrements de l'Eglise*." This proposal was rejected, though G.'s widow offered to accept

(1) *Present*: Lord Selborne, Sir James W. Colvile, Sir Robert J. Phillimore, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

burial in the larger part without religious services.

On a petition by G.'s widow for a mandamus to the respondents upon receipt of the customary fees to bury G.'s body in the said cemetery conformably to usage and law, and to enter such burial in the civil register, a writ of summons was issued by the Superior Court which, in substance, called upon the respondents to show cause why a writ of mandamus should not be issued. Thereupon the respondents petitioned, *inter alia*, that the writ being of summons and not of mandamus, might be annulled for irregularity; traversed the plaintiff's petition and pleaded, first, the irregularity above mentioned; secondly, that they had not refused, but had offered such burial as G. was entitled to; thirdly, that they were legal proprietors of the cemetery, free from civil interference or control as respects the service of religion and the exercise of its ceremonies, and were legally entitled to point out the precise spot in the cemetery where each burial was to be made; that they were also civil officers within certain limits, and civilly responsible in that capacity only; that they had offered such burial, and refused nothing but ecclesiastical burial, on the ground that G. had been for ten years previously to his death "notoriously and publicly subject to canonical penalties," resulting from the before-mentioned membership, and at the direction of the proper ecclesiastical authorities. They further, in special replication to the plaintiff's answer, denied that the civil courts could examine the grounds of refusing ecclesiastical burial, which they nevertheless specified, averring that in consequence of the premises G. must be considered "*un pécheur public*," and as such deprived of ecclesiastical burial by the Roman Catholic ritual.

Held, firstly, that the writ of summons was in proper form according to the Code of Procedure in Canada:

Secondly, that G. never having been excommunicated *nominatim*, and never having been adjudged or proved to be "*un pécheur public*" within the meaning of the Quebec ritual, was not at the time of his death under any such valid ecclesiastical sentence or censure as would, according to the Quebec ritual, or any law binding upon Roman Cath-

olics in Canada, justify the denial of ecclesiastical sepulture to his remains.

Thirdly, that the respondents, who were sued in their corporate capacity as holders of land and administrators of the cemetery, were bound to give to G.'s remains burial in the larger part of the cemetery, on payment of the accustomed fees; and that a peremptory writ of mandamus should be issued accordingly.

Quare, whether their Lordships would have power in a suit properly framed for that purpose to order the performance of the usual religious rites.

Although the Roman Catholic Church in Canada may, on the conquest in 1762, have ceased to be an established church in the full sense of the term, it nevertheless continued to be a church recognized by the state, retaining its endowments and continuing to have certain rights (*e.g.*, the perception of *dîmes* from its members) enforceable at law.

Although the civil courts in Canada may not be competent to entertain a suit in the nature of the "*appel comme d'abus*," yet the jurisprudence and precedents relating to such a suit may be considered as evidencing the law of the Roman Catholic Church in Canada.

Long v. The Bishop of Capetown (1), approved.

Even if the Roman Catholic Church in Canada were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, courts of justice are still bound, when due complaint is made that a member of the society has been injured as to his rights in any matter of a mixed spiritual and temporal character, to inquire into the laws and rules of the tribunal or authority which has inflicted the alleged injury, and to ascertain whether the act complained of was in accordance with the law and rules and discipline of the Roman Catholic Church which obtain in Lower Canada, and whether the sentence, if any, by which it is sought to be justified was regularly pronounced by competent authority.

Semble: The Ecclesiastical Law which now governs Roman Catholics in Lower Canada must be taken to be identical

(1) 1 Moore P. C. (N.S.), 461.

1874

Boyd v. Phillpotts.

with that which governed the French province of Quebec; except so far as modifications are proved to have been introduced by valid consensual contract.

Their Lordships approved the refusal by the Court of Queen's Bench to re-

ceive a petition of recusation against the judges, alleging that they acknowledged the Roman authority, and were thereby disqualified to try whether the civil power can entertain an "*appel comme d'abus*."

[Law Reports, 4 Admiralty and Ecclesiastical, 297.]

Aug. 6, 1874.

[IN THE ARCHES COURT OF CANTERBURY.]

297]

*BOYD and Others v. PHILLPOTTS.

Appeal from Visitation by Bishop or Ordinary—Jurisdiction—Appellate Jurisdiction exercised by Judges of the Arches—Power of the Bishop of the Diocese over the Fabric of the Cathedral Church of Exeter—Reredos—Legality of Carved Images not on any Tomb or in any Painted Window—3 & 4 Edw. 6, c. 10.

A carved stone structure or screen at the back of the holy table, called a reredos, was erected in Exeter Cathedral by the Dean and Chapter of Exeter. On the structure were sculptured representations, in bas-relief, of the Ascension, the Transfiguration, and the Descent of the Holy Ghost on the day of Pentecost, and figures of angels, and the screen was surmounted by a cross.

The Bishop of Exeter, at a visitation of the cathedral of the dean and chapter, held the structure to be illegal, and ordered it to be removed:

Held, by the Court of Arches, that it had jurisdiction to entertain an appeal from the judgment of the bishop:

Held also, that the structure was not illegal; that if it were illegal, the bishop had not jurisdiction to order its removal.

THIS was an appeal from a judgment of the Bishop of Exeter, pronounced at a visitation of the cathedral church of Exeter.

The case occupies nearly 100 pages of the original report. It is of no practical use in this country. It contains an elaborate sketch, by Sir Robert Phillimore, of church embellishment, and symbols, of interest as such to the curious in such matters. The head notes are inserted simply to call the attention of those wishing to investigate the subject. It was affirmed by the Privy Council. L. R., 6 Pr. Coun. Ca., 435.

C A S E S
DETERMINED BY THE
COURT OF PROBATE
AND BY THE COURT FOR
DIVORCE AND MATRIMONIAL CAUSES.

[Law Reports, 3 Probate and Divorce, 209.]

Nov. 18, 1874.

*In the Goods of PROTHERO. [209]

Administration with Will annexed—Insolvent Estate—Grant to a Legatee limited to Trust Property.

The deceased by his will made his wife sole executrix and residuary legatee. By a codicil he devised and bequeathed to A. B. all property held by him upon any trust or by way of mortgage. The deceased died insolvent, and the widow renounced probate of the will and codicil as executrix, and administration as residuary legatee. The court granted administration with the will and codicil annexed, to A. B., limited to the trust property so far as it was personalty left to him by the codicil.

CHARLES PROTHERO, of Llanvrechva, Monmouthshire, and of Montpellier Terrace, Cheltenham, Gloucestershire, died on the 16th of June, 1874, having executed a will without date, in which he appointed his wife Sophia Cecilia Prothero sole executrix and residuary legatee. He also made a codicil thereto, dated the 30th of January, 1871, in which he devised and bequeathed to Charles Burton Fox all property held by the deceased upon any trust or *by way of [210 mortgage. The deceased died insolvent, but left trust estates, hereditaments, and premises, of great variety and value, to be administered. Mrs. Prothero renounced, as executrix, probate of the will and codicil, and, as residuary legatee, administration with such will and codicil annexed. The next of kin of the deceased were three children of full age, who were willing to renounce administration of the goods of the deceased, and as parties entitled in distribution there were two infant grandchildren of the deceased.

Nov. 17, 1874. *Pritchard* moved for administration with the will and codicil annexed to be granted to Mr. Fox, limited to the trust estates devised to him by the codicil. He

1874

In the Goods of Horsford.

relied upon the cases: *In the Goods of Steadman* ⁽¹⁾; *In the Goods of Biou* ⁽²⁾; *In the Goods of Watts* ⁽³⁾; a similar application was refused on the ground of the inconvenience of having diverse representatives to the different parts of the estate, but that would not arise in this case: *In the Goods of Somerset* ⁽⁴⁾.

Cur. adv. vult.

Nov. 18. SIR J. HANNEN: I think this grant may go in a limited form. But it appears to be uncertain, from the papers before me, what is the nature of the property that has vested in Mr. Fox. It would appear, from the general language used in the codicil, as if it were merely realty. It must be shown to the satisfaction of the Registrar that there is personalty to which the grant would be applicable, and it will be limited to such personal property as vested in him under the provisions of the codicil to the deceased's will.

Attorneys: *Hunt & Son.*

[Law Reports, 3 Probate and Divorce, 211.]

Dec. 2, 1874.

211]

*In the Goods of HORSFORD.

Will—Execution—Testimonium and Attestation Clauses with Signature on a separate Paper attached to Instrument by String—Alterations unattested—Paper pasted over Legacies.

The deceased signed his name and the witness attested such signature on a piece of paper upon which no dispositive part of the will was written. This paper was attached by string to the paper on which the will was written just opposite to the termination of the writing. On the evidence of the witnesses that the papers, to the best of their belief, were in the same state when they signed them as they are now: it was held that the execution was valid.

Where a testator has pasted over a whole legacy a piece of paper on which at some time, about which the witnesses can give no information, he has written a new bequest, the court will not order the upper paper to be removed, and will direct the probate to issue in blank as to that legacy; but if the testator has covered over the amount of a legacy only, leaving the legatee's name untouched, the court will consider it a case which comes under the principle of a dependent relative revocation, and will endeavor to discover the amount of the legacy originally bequeathed by removing the upper paper.

GEORGE FAHIE HORSFORD, late a captain in Her Majesty's service unattached, on the 1st of April, 1868, executed a will which was written on two sheets of foolscap paper. The writing covered five sides of the paper, terminating at the bottom of the fifth side, with a full attestation clause where

⁽¹⁾ 2 Hagg. Eccl., 59.

⁽²⁾ 3 Curt., 739.

⁽³⁾ 1 Sw. & Tr., 538.

⁽⁴⁾ Law Rep., 1 P. & M., 350.

the witnesses signed their names. At the top of the sixth side were the words, "To which will and testament I hereunto annex my seal and signature, dated this 1st day of April, in the year of our Lord 1868. Geo. F. Horsford, captain unattached." Pieces of paper were pasted over certain parts of the will with writing on them, as appears in the paragraphs following in italics: "I leave the interest on £300 9s. 6d. bank stock to my god-child, Rosina Horsford Wood; and in case of her death unmarried or, if married, childless, then to my brother, Sir Robert Marsh Horsford, Knt., C.B., for his lifetime, and afterwards the interest to my cousin Amelia Thorpe, widow of Colonel Thorpe, formerly of the 89th regiment; and after her death the principal of the said bank stock to *Mary Ffinch, the eldest daughter of John Ffinch of Greenwich, Esquire, deceased.* I also leave and bequeath to my adopted god-child, Rosina Horsford Wood, for her sole use during her lifetime the interest of *the sum of £174 2s. 3d. reduced 3 per cent. [212 annuities, and, if she marry and have children, the principal to them after her decease. In case she should die single, or, if married, childless, the interest of the said amount will revert to my brother, Sir Robert Marsh Horsford, Knt., C.B., and then to my cousin, Amelia Thorpe, &c., and after her death the principal to *Mary Graham, daughter of the Rev. Leonard Graham, who married Lavinia Horsford.*" Sir Robert Marsh Horsford was appointed executor. On the 29th of July, 1874, the deceased executed a codicil to his will in the following manner: It was written on a sheet of foolscap paper, the writing covering the first and half the second sides of the sheet. Attached by a string, passing through the fold of the sheet about opposite to the termination of the writing, was a separate paper on which was written, "To which codicil I hereunto annex my seal and signature, dated this 29th day of July, 1874." This was followed by the signatures of the deceased and of the witnesses, Captain Hedley and Mrs. Bourne. The contents of the codicil, so far as material, were as follows: "Febry., 1870. Codicil to the will of Captain George Fahie Horsford. Should anything occur to prevent from death my will acting in any way I have stated, I leave and bequeath to Mrs. George Davies, formerly Rosina Horsford Wood, 82 Blake Street, Barrow-on-Furness, Lancashire, should she survive any children she may have, or in the event of her not having any, the whole of the money invested in my name in the different funds of the Bank of England, together with my bank stock, for her sole use. I leave and bequeath *ten*

1874

In the Goods of Horsford.

pounds, *which will be found* with my photograph, to Emily Bush, the youngest daughter of Lieut.-Colonel J. T. Bush, late of the Honble. E. I. Service, Bengal Army, as a remembrance for kindly coming to see me when she was a little girl!" The words in italics were written on pieces of paper pasted over the original writing of the codicil. The witnesses, Captain Hedley and Mrs. Bourne, who attested both documents, in their affidavit, stated that at the execution of the will they had no opportunity of observing the earlier pages of it, and did not notice whether the strips of paper now pasted thereon were there at the time of attestation. That, as regards the codicil, they subscribed their names in the presence of the deceased and of each other, having been 213] requested *by testator to attest his signature thereto. That they did not see the will at the time of the execution of the codicil. That the codicil is now in the same plight and condition as it was at the time of attestation, save that they did not see the first page of the said codicil, and they are unable to say what was written on that page nor whether the pieces of paper were pasted on, or if anything was written thereon. That the writing on the second page of the codicil was then about the same as now.

The court, not being satisfied on the affidavit as to the due execution or plight of the codicil, directed the attendance of the witnesses in court. On the 1st of December they were examined. Captain Hedley stated that he knew Captain Horsford, who had asked him on two occasions to witness papers. That in the summer of this year he was present in deceased's room. Mrs. Bourne, the landlady, was also there. He, Mrs. Bourne, and Captain Horsford, were only present. Deponent asked no questions. He could not say whether he saw deceased's signature. Deceased asked him to witness a paper. He did not recollect whether there was a name on the paper. It was a sitting-room. Deceased was standing. There were pens and ink on the table. He could not recollect anything else. The deceased asked him to sign, which he did. He believed the paper was then attached as now. He did not notice the deceased's name, or whether the paper was signed. He was not accustomed to business. Mrs. Bourne deposed that Captain Horsford lodged in her house. He had asked her to witness papers twice. In the summer, about July last, he asked her to come into his room with Captain Hedley to sign a paper. She did not see him sign it. It was signed before she entered the room. Captain Hedley was in the room before she was. She saw Captain Hedley sign. Captain Horsford pro-

duced the paper. To the best of her recollection all the writing as it now appears on the paper was there when she signed.

Nov. 10, 1874. *Nugent* applied to the court to grant probate of the will and codicil. He referred to *In the Goods of Huckvale* (¹); *In the Goods of Puddephatt* (²).

Cur. adv. vult.

*Dec. 2. SIR J. HANNEN: The testator, George [214 Fahie Horsford, deceased, made his will, bearing date the 1st day of April, 1868. It covers four pages of a sheet of foolscap, and continues on the fifth page, being the first of a second sheet. At the bottom of the fifth page is a formal attestation clause, and the signature of the witnesses are added below the clause. The signature of the testator appears at the top of the sixth page, preceded by these words: "To which will and testament I hereunto annex my seal and signature, dated this 1st April, in the year of our Lord 1848." The attesting witnesses state that, to the best of their recollection, the testator showed and acknowledged to them his signature, signed on the will on the upper part of the sixth page of the said paper, and that then they signed the attestation thereof. I think that the execution of the will by the testator is valid, notwithstanding the position of the signature, by virtue of the statute 15 Vict. c. 24. There is also a codicil, dated the 29th of July, 1874, in which the signature and attestation of the witnesses are on a separate sheet, attached by a string to the codicil. The evidence of the attesting witnesses is not very clear as to what occurred at the time of execution, but I have come to the conclusion that the sheet was attached to the codicil at the time, and that the testator acknowledged his signature to the witnesses before the attestation. A further question arose as to certain obliterations which appear upon the will and codicil, and of which the attesting witnesses were unable to give any account. Strips of paper have been pasted over portions of the original will and codicil, and on some of these strips, words have been written by the testator, by which he has sought to make bequests to several legatees. It is clear that the words so written on the strips of paper must follow the fate of ordinary alterations, and in the absence of evidence showing when they were made, it must be presumed that they were so added after the execution of the will and codicil. But ought I to treat the words over which the pieces of paper are pasted as effectually obliterated, and grant pro-

(¹) Law Rep., 1 P. & M., 875.

(²) Law Rep., 2 P. & M., 97.

1874

In the Goods of Horsford.

bate of the will or codicil with the hidden passages in blank, or ought I to endeavor to ascertain what words have been covered up, and include them in the probate? As to the will, the answer to these questions depends upon the construction to be put on the 21st section of the statute 1 Vict. 215] c. 26, by which *it is enacted that no obliteration, interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will. Soon after the passing of the act, Sir H. J. Fust, in *Townley v. Watson* (1), decided that the construction to be put upon the words of the 21st section was that the effect of the will before the alterations must be apparent on the face of the instrument itself. He said: "What is an obliteration? Is it not by some means covering over words originally written, so as to render them no longer legible? I cannot understand, if the Legislature really intended that extrinsic evidence should be admitted, why a few more words were not added, which would have freed the section from all doubt; for instance, why was it not thus penned: 'unless the words shall be capable of being made apparent?'" I think it is impossible to read the words of the statute, and not say that it was the intention of the Legislature that, if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the act of Parliament. Mr. Justice Williams (Executors, p. 139, 6th ed., in a note) says: "In a case before Sir H. J. Fust, he ordered that the erasures in a will should be carefully examined in the registry with the help of glasses, by persons accustomed to writing, to ascertain whether the words could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank. Generally speaking, the Ecclesiastical Court will not in the first instance take upon itself to decide whether the words obliterated can or cannot be made out. It must be proved." But it has not been the practice to adopt any means of ascertaining what the words attempted to be obliterated were, other than mere inspection by aid of glasses. Chemical agents have not been resorted to in order to remove

(1) 3 Curt., 761.

any portion of the obscuring ink, and I do not think it would be *proper to adopt such means. I think that [216 the word "apparent" in the 21st section means apparent on the face of the instrument in the condition in which it was left by the testator, and that if he has had recourse to extraordinary means to obliterate what he had written, then this court is not bound to take any steps to undo what he had done. The statute does not draw any distinction between different modes of obliteration. The effacement of the original writing as performed by this testator, by pasting paper over it, is complete, and I can see no reason why the court should remove the pasted paper used as the instrument of obliteration, rather than ink used for the same purpose. I shall therefore give no directions on the subject so far as the will is concerned; and, assuming that the words covered over cannot be ascertained by inspection, the probate must go with those parts in blank. But with regard to the obliterations in the codicil, the case is different. There the amount of a legacy has been obliterated, leaving the name of the legatee untouched. As to this, I am in a position to infer that the testator's intention was only to revoke that portion of the codicil which was covered in the event of his having effectually substituted another bequest in its place, and thus the doctrine of dependent relative revocation becomes applicable. As to these alterations, the court is at liberty to have recourse to any means of legal proof by which to ascertain the original disposition, and amongst such means, the removal of the strips of paper is the most obvious. I therefore direct that the strip on which is written the word *ten*, as well as the strip on which are written the words *which will be found with* (to which the same remarks are applicable) be removed in the registry from the codicil, and that probate be granted of that instrument in its unaltered condition.

Attorney: *T. H. Strangways.*

[Law Reports, 3 Probate and Divorce, 217.]

Feb. 9, 1875.

217] *FAIRLAND V. PERCY and Others.

Will—Power to carry on Business—Debts incurred by Administratrix in so doing—Administration de bonis non—Creditor.

The deceased by his will directed his executors and trustees (who, however, did not act) to permit his wife to receive the rents and annual profits of his estate, and to carry on his business of a draper for her natural life. She took administration with the will annexed, of the goods of the deceased, and, in carrying on the business, incurred debts to many persons, more especially to the plaintiff. She died intestate and insolvent, and the parties entitled to the reversion of the deceased's estate having been cited did not accept administration of the unadministered estate of the deceased:

Held, that, as the estate of the widow was primarily liable for the debts contracted by her in carrying on the business, the plaintiff must first take administration to her effects before he could be entitled to a grant of administration *de bonis non* of the estate of the deceased.

ROBERT PERCY, of Easington, in the county of Durham, tailor and draper, died on the 7th of February, 1869, having made his will, dated the 9th of March, 1868, and therein appointed William Peacock and Henry Fenwick executors and trustees. The material clauses of the will were as follows:

"I give, devise, and bequeath unto my said trustees, their heirs, executors, and administrators, all my real and personal estate whatsoever and wheresoever, and of whatever nature or kind soever, which I may be possessed of at the time of my decease, upon trust to permit and suffer my dear wife to receive the rents and profits and to carry on my business of a tailor and draper for the term of her natural life, if she shall so long remain my widow; and from and after her decease, or second marriage, I direct that my said trustees, or the survivor of them, his executors or administrators, or other the trustee or trustees for the time being of this my will, who may be appointed as hereinafter mentioned, may and shall as soon as conveniently may be after my decease sell and convert into money all such parts of my said trust estate as shall not consist of money, either by public auction or private contract, and for such price or prices as can be reasonably had or gotten for the same with liberty to buy 218] and resell the same or any part thereof *without being answerable for any loss in price by such resale, and do and shall collect and get in and receive all moneys due and owing to me, and do and shall stand possessed of and interested in the moneys to arise and be produced from such sale or sales, and all my money to be gotten and received as aforesaid,

upon trust, after retaining all such costs and expenses as they may incur in or about such sales or sale or otherwise, to pay and divide the same equally amongst all and every my child and children, share and share alike, as tenants in common, upon the youngest of my children attaining the age of twenty-one years or dying under that age; and in case any of my said children shall die under the age of twenty-one years unmarried, or married without leaving any lawful issue him or her surviving, then I direct that the shares or share of him or her dying as aforesaid shall be equally divided amongst the survivors. And I also direct that in case any of my said children before mentioned should die under the age of twenty-one years, leaving lawful issue him or her surviving, then that the shares or share of such children or child so dying as aforesaid shall be divided equally amongst their, his, or her respective issue, such issue standing in the place and taking their deceased parent's share. . . . And I absolve the trustees or trustee for the time being of my will from responsibility for the acts and defaults of each other, and from involuntary losses, and also authorize such trustees and trustee to retain and allow to each other all expenses incurred in or about the execution of the trusts of my will."

The executors and trustees, Messrs. Peacock and Fenwick, renounced probate of the will, and did not accept the trusts nor in any way act therein, and no new trustees have been appointed. On the 12th of October, 1869, administration with the will annexed of the goods of the deceased was granted to his widow, Martha Percy, as the universal legatee for life named therein. She carried on the testator's business until the 14th of January, 1874, when she died a widow (never having married again) intestate, and insolvent, and no administration has been granted of her estate. With the exception of a policy of insurance for £100, the whole of the testator's property was employed by Mrs. Percy in carrying on the business, and in so doing she incurred liabilities to the *plaintiff, Matthew Fairland, a woolen manufacturer, trading at Huddersfield as John Stott & Co., and in consequence thereof the estate of Robert Percy, the deceased, in the opinion of an equity counsel, is indebted to the plaintiff in the sum of £399 16s. 4d. The property of the deceased, at the time of his death, consisted of stock-in-trade, £1,153 14s.; book debts, £2,824 1s. 3d.; policy of insurance, £100; and furniture, £96; from which had to be deducted £1,014 15s. due to trade creditors, and £707 6s. 5d. bad debts, leaving a balance of £2,451 13s. 10d. The unadministered estate

1875

Fairland v. Percy.

consists of the household furniture, the insurance of £100, and book debts agreed to be sold for £600. On the 9th of January, 1875, Mr. Fairland took out a citation calling upon the parties interested in the estate to take administration with the will annexed of the unadministered effects of the deceased, or to show cause why it should not be granted to him as an equitable creditor of the deceased. To this citation no appearance was entered.

Jan. 26. *H. Sutton* moved the court to grant such administration to Mr. Fairland. As the widow has died insolvent, and the deceased directed that his whole estate should be employed in carrying on the business, the plaintiff is entitled to recover against the deceased's general estate the amount of his debt, although such debt was not incurred until after the death of the deceased; and, therefore, as the parties interested under the will refuse to take administration, he is entitled to it. He referred to *Ex parte Garland* ⁽¹⁾; *Cutbush v. Cutbush* ⁽²⁾; *Owen v. Delamere* ⁽³⁾.

Cur. adv. vult.

Feb. 9. SIR J. HANNEN: In this case the plaintiff claims to be a creditor in equity of the estate of Robert Percy, deceased, and as such creditor asks for administration (with the will annexed) of the unadministered personal estate of the deceased. The testator, by his will dated the 9th of March, 1868, appointed William Peacock and Henry Fenwick ⁽²²⁰⁾ wick trustees and executors, and gave, devised and bequeathed to his said trustees all his real and personal estate upon trust to permit and suffer his wife to receive the rents and profits and to carry on his business as a tailor for the term of her natural life, if she should so long remain his widow, and from and after the decease or second marriage of his said wife he directed the trustees to sell and convert into money all parts of his estate not consisting of money, and to divide the proceeds amongst his children as tenants in common. William Peacock and Henry Fenwick refused to accept the trusts of the will, and duly renounced probate, and thereupon administration with the will annexed of the personal estate and effects of the deceased was granted to the widow, who, under the authority given to her to carry on the business, continued to do so down to the time of her death in January, 1874. She did not marry a second time. While she so carried on the business, the plaintiff and his partner (trading under the style of Stott & Co.) supplied goods to the widow in the way of the said trade of a tailor,

⁽¹⁾ 10 Ves., 110.

⁽²⁾ 1 Beav., 184.

⁽³⁾ Law Rep., 15 Eq., 134.

to the amount of £399 16s. 4d., and this debt remains wholly unpaid, and the plaintiff and his partner hold no security for any part of it. The plaintiff claims in respect of this debt to be an equitable creditor of the estate of Robert Percy, deceased. All parties interested in the estate of the deceased have been cited, but do not appear. It appears that Martha Percy, the widow of the deceased, died wholly insolvent, and left no property out of which the plaintiff's debt can be satisfied. There can be no doubt that Martha Percy was originally the legal debtor of the plaintiff's firm, and that had she or her estate been solvent they would have been bound to look to her or her estate for payment, and that no claim could have been made against the estate of the deceased. But the cases cited in argument show that where a testator by his will directs that his business may be carried on, and that his personal estate shall be used as capital with which to do so, the persons who after his death become creditors of the business, in addition to the personal responsibility of the individuals who give the order for the goods or otherwise contract the debt, are entitled in equity to claim against the estate of the testator, to the extent that he authorized it to be used in the business.

*This is clearly laid down by Lord Eldon in *Ex parte* [221 *Garland* (')]: "As to creditors subsequent to the death of the testator, in the first place, they may determine whether they will be creditors. Next, it is admitted they have the whole fund that is embarked in the trade, and in addition they have the personal responsibility of the individual with whom they deal, the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate embarked in the trade. They have not a lien upon anything else." The same principle is laid down in the other cases, the only one of which I need refer to is that of *Owen v. Delamere* ('), recently decided by Sir J. Bacon, V.C. In that case a creditor of a business, carried on after the death of a testator with a portion of his estate in accordance with the directions of his will; filed a bill for the administration of the testator's personal estate, as in a creditor's suit. This bill was dismissed by the Vice-Chancellor on the ground that as it appeared that the persons who carried on the business and had contracted the debt were solvent, the plaintiff's remedy was by action at law against them, and not by an administration suit in the Court of Equity. And the Vice-Chancellor more than once points out that the case would be different if, as in the present case,

(') 10 Ves., 110.

(') Law Rep., 15 Eq., 134.

1875

Fairland v. Percy.

the person primarily liable were insolvent. He says: "An executor authorized to carry on a business, who carries it on, is liable for every shilling on every contract he enters into; besides that, if he becomes bankrupt, the persons who have trusted him have a right to say that that portion of the trust estate which was committed to him for the purpose of carrying on the business shall not be the subject of general administration." And again: "There can be no doubt about the principles on which a court of equity deals with such a case: the court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to the purposes of the trust that estate which the testator designated and directed to be employed for that purpose. As Lord Eldon points out in *Ex parte Garland* ⁽¹⁾, the creditor has not only the personal remedy against the executor, but he has a right also, if that should fail, to come against the trust estate: and so here, if an action had been 222] brought *against the defendants, and a fruitless judgment had been recovered against them, there would have been a right to go against the trust estate which the testator committed to the executors if it should be in existence in specie." I think that these passages establish that the plaintiff, in the existing state of facts, is an equitable creditor of the personal estate of Robert Percy, the deceased, in respect of the debt which the testator's widow contracted in the course and for the purpose of carrying on the business. In arriving at the conclusion that administration may be granted to the plaintiff as an equitable creditor, I am fortified by the decisions in analogous cases where administration has been granted to persons as creditors of a deceased's estate in respect of debts not contracted by the deceased or in his lifetime. I allude to the cases of undertakers and those who have been at the expense of burying the deceased: *Spitty's Case* ⁽²⁾; *Newcombe v. Beloe* ⁽³⁾. It will be seen that my decision is based on the assumption that the estate of Martha Percy, the widow, is insolvent. As no opposition has been offered to the motion, the fact of this insolvency rests on the affidavit of the applicant; but though the estate may be insolvent, it is highly improbable that it is absolutely *nil*. On the contrary, it is highly probable that there must be some trade debts due to the widow, and not to the estate of her deceased husband; and, further, it is possible she may have other creditors than trade creditors. I think,

⁽¹⁾ 10 Ves. 110.

⁽²⁾ Coote's Practice of the Court of Probate, 6th ed., p. 94.

⁽³⁾ Law Rep., 1 P. & M., 314.

therefore, it is necessary that the plaintiff should in the first place as a legal creditor of the widow, take out administration to her estate. And further, as the interests of persons not before the court may be affected, I shall impose the condition that justifying security be given.

Proctor: *H. C. Coote.*

[Law Reports, 3 Probate and Divorce, 223.]

April 30, 1874.

*OUSEY V. OUSEY and ATKINSON.

[223]

Separation before Adultery complained of—Reasonable Excuse for Separation—Non-consummation of Marriage.

A husband petitioning for a dissolution of his marriage admitted that he had separated himself from his wife before the adultery complained of, and had not contributed to her support, but alleged that such separation was caused by her persistent refusal to allow him to consummate the marriage, although he was able and willing to do so. The respondent did not deny the fact of non-consummation, but alleged that the petitioner was to blame for it owing to his physical incapacity. The court, without deciding the question of fact whether the non-consummation was the fault of the petitioner or of the respondent, came to the conclusion that the petitioner had acted under a *bona fide* belief that the respondent had wronged him, and therefore considered that he had not been guilty of such desertion or wilful separation without reasonable excuse as to deprive him of his right to a decree of dissolution on the ground of the respondent's adultery.

THE petitioner, who was a commercial traveller, married the respondent on the 17th of December, 1868, and they lived together at Ashton-under-Lyne until the 29th of May, 1869, when he separated from her. He had made no provision for her maintenance, except from November, 1869, until the beginning of 1871, when he paid her 8s. a week, in consequence of an application made by her to the board of guardians for an order against him. It was proved, and was not disputed, that in and since 1872 she had cohabited with the co-respondent as his wife, and that she had given birth to a child of which he was the father. The respondent originally pleaded a mere traverse of the adultery charged, but she afterwards, by leave of the court, amended her answer, and alleged that the petitioner had separated himself from her without reasonable excuse, and had deserted her, and had thereby been guilty of wilful neglect and misconduct conducing to her adultery. She was examined in support of this allegation, and she stated that the marriage had never been consummated in consequence of the incapacity of the petitioner, and that she therefore considered it null and void. The petitioner admitted that the marriage

1874

Ousey v. Ousey.

had never been consummated, but alleged that he had always been able and willing to consummate it, and that the respondent had persistently refused to allow him to do so; that this refusal on her part was the cause of his separating himself from her, and that he would have been willing to [224] return *to her if she would have consented to cohabit with him as a wife.

Searle (*Burder* with him), for the petitioner.

Inderwick, Q.C., for the respondent.

[The following cases were cited: *Yeatman v. Yeatman* (¹); *Townsend v. Townsend* (²); *Jeffreys v. Jeffreys* (³); *Haswell v. Haswell* (⁴); *Pearman v. Pearman* (⁵).]

THE JUDGE ORDINARY: This is a very peculiar case. Both parties agree in the fact that the marriage has not been consummated, and it is therefore evidently to the advantage of both that it should be dissolved. The present mode of investigating the question which has been raised of which of them is to blame for the existing state of things is certainly unsatisfactory. It may be that the husband has taken the course of instituting a suit in this form in order to avoid the shame of the fact appearing that he is not competent. The respondent, on the other hand, may be actuated by a desire to defend herself in this way against the charge of violating her duty as a wife. At all events, I have at present no satisfactory means of determining the question which has been raised between them. It ought to have been raised by one or the other in a suit for nullity. It is a grave matter of observation that the respondent did not put forward the case which she now sets up in the first instance. When the application was made to amend the answer I inquired the reason why such a defence had not been brought forward at the earliest moment, and no excuse was given for the delay. These two persons are in direct opposition to each other on a fact the knowledge of which is confined to themselves, and without the evidence of medical men I have no means of deciding between them. The fact that the respondent had a child at a later period by no means disposes of the matter. I must take it that the question of whose fault it was that the marriage was not consummated is one on which I am not able to arrive at any definite conclusion. [225] I must add that from *my experience in such cases when they have been investigated in a proper manner, it is a question upon which a man and woman may sometimes for

(¹) Law Rep., 1 P. & M., 489.

(²) Law Rep., 3 P. & M., 129.

(³) 3 Sw. & Tr., 493; 33 L. J. (P. M. & A.), 84.

(⁴) 1 Sw. & Tr., 502; 29 L. J. (P. M. & A.), 21.

(⁵) 1 Sw. & Tr., 601; 29 L. J. (P. M. & A.), 54.

a considerable time, if not forever, remain in doubt. It may possibly be merely nervousness on the one side or the other which has contributed to the disappointment of both. I think I am justified on the evidence before me in saying that it may well have been a matter of doubt between these two persons on which side the fault or physical defect lay. In such a state of things, I think that a husband taking the view that the fault was not with himself but with the wife, and in that state of mind coming to the conclusion that the connection between them was intolerable, leading to misery and not to happiness, because the wife was either unable or resolutely unwilling to consummate, and therefore, leaving her, cannot be said to have been guilty of such desertion as is contemplated by the statute. His proceeding, if a mistaken one, would, I think, under such circumstances, be excusable, and the court would not be bound by reason of it to visit on him the penalty of depriving him of the relief to which he would otherwise be entitled in event of the wife not remaining constant to him.

That is the view which I take of the present case. Although, perhaps, what the husband did may not be altogether what he ought to have done and what he might be expected to do; although he may not have acted generously in leaving the wife without any means of support until he was compelled to contribute to her support, yet assuming, as I do, that he so acted in consequence of the unhappy state of things existing between them; and in consequence of a *bona fide* belief on his part that she was wronging him, I think that cannot be treated as desertion; and I am not bound to refuse him the relief he seeks. There will, therefore, be a decree *nisi*, but the co-respondent must equally with the petitioner have the benefit of my opinion, that he and the respondent acted on the *bona fide* belief that her marriage with the petitioner was void, and therefore the co-respondent will not be condemned in costs.

Solicitor for petitioner: *Joseph D. Nelson.*

Solicitors for respondent: *Rowley, Page & Rowley.*

[Law Reports, 3 Probate and Divorce, 230.]

Jan. 19, 1875.

230]

*A v. A.

Suit for Restitution of Conjugal Rights—Hearing in Camera—Practice.

In every matrimonial suit, which before the passing of the Divorce Act (20 & 21 Vict. c. 85), might have been determined in an Ecclesiastical Court, the Judge Ordinary may, if he considers the circumstances of the case to require it, direct that the hearing shall take place in private.

THIS was a suit for restitution of conjugal rights brought by the wife; the respondent set up a charge of cruelty, and prayed for a judicial separation. The cruelty alleged was the writing a letter charging the respondent with unnatural practices. On taking the court's directions as to the mode of trial,

Dec. 15, 1874. *Dr. Tristram*, for the respondent, asked that the question at issue should be determined before the court itself in *camera*.

Bayford, for the petitioner, objected to that course, and applied that the case should be heard before a special jury in open court.

Cur. adv. vult.

Jan. 19. THE JUDGE ORDINARY: This case was argued before me last term. It is a suit for restitution of conjugal rights in which certain charges of unnatural practices have been alleged. It has been the usual practice to hear such cases in *camera*, but on this occasion that course has been objected to, and I took time to consider whether or not I have authority to try such a matter in *camera*, and if so, whether in the exercise of my discretion I should do so in this case. In the early period of the existence of this court, it seems to have been doubted whether the court could under any circumstances hear even a suit for nullity of marriage in *camera*. The question was discussed in the case of *H., falsely called C. v. C.* (1) That was a petition for nullity of marriage, and there the Judge Ordinary, Sir C. Cresswell, said: "My own impression on the point I have already had occasion to mention, namely, that we have no power to hear 231] any case otherwise than *in open court; but as I now have the advantage of the assistance of my learned brothers, I will confer with them." And subsequently Mr. Justice Williams and Mr. Baron Bramwell, sitting with the Judge

(1) 1 Sw. & Tr., 606.

Ordinary, gave their opinions that the court had no power to sit otherwise than with open doors. It would seem, however, that that rule has not been acted upon. On the contrary, such cases have been heard in *camera* both by my predecessor and myself, and I therefore think it must be taken that the impression which was entertained by Sir C. Cresswell was afterward abandoned. The practice must now be considered as settled, and all cases which could have come before the old Ecclesiastical Courts, and, might have been heard by those courts in *camera*, this court has power to investigate in private. In cases however of dissolution of marriage which arise under the acts constituting the court, this course of investigation cannot be pursued, but this court must proceed in the way usual in other courts. That was decided in *C. v. C.* (¹), where the Judge Ordinary said, "I have considered the matter, and I think I have no power to hear the case in *camera*. The only causes which have been heard in private are suits for nullity of marriage, and in so doing the court has followed the practice of the Ecclesiastical Courts, which it is expressly empowered to do in such suits by the statute 20 & 21 Vict. c. 85, s. 22. There is, however, nothing at all in that statute which gives such a power to the court in suits for dissolution of marriage, and in one of the amendment acts a clause which had been introduced for the purpose of giving such a power was rejected by the Legislature. I think I am bound to hear the case in open court." I have here a distinct expression of opinion that suits which the Ecclesiastical Courts would have heard in *camera* I still have power to hear privately. It does not appear, however, that the Ecclesiastical Courts did, in fact, hear cases in private merely because the investigation might involve an inquiry into charges of unnatural practices. At any rate, I do not find any report of an application to hear such cases in *camera*. It does not follow that when such charges are made the investigation of them will necessarily be of such a character as to require the exclusion of the public, for in courts of *justice we cannot be over fastidious in such mat- [232 ters, and disagreeable as it may be to inquire into the truth of such charges, it must be done if circumstances require it, whether few or many persons are present. But I am of opinion that there may be cases in which it would be desirable for the sake of public decency that the investigation should take place in private, and as the Ecclesiastical Courts always exercised such a power in nullity suits, I conceive they must have had the same power in other cases where it

(¹) Law Rep., 1 P. & M., 640.

1875

Bland v. Bland.

was desirable from respect to public decency or morality that they should exercise it. In cases, therefore, in which it is not advisable to carry on the suit in open court, I shall order it to be heard in private. The next question is, whether in the exercise of my discretion, I should make such an order in this case. It is to be remembered, that if in the course of the investigation I should find that the matters involved in the case are not in fact of such a character as to render it necessary to continue the inquiry in private I may at once admit the public, and conduct the suit in the usual way. I think *prima facie* it appears from the affidavits before me that it is highly probable that the facts in this suit ought not to be investigated in public. I shall therefore order that the inquiry shall commence with closed doors, but if it turns out that the circumstances are not offensive to public decency, I shall order them to be opened.

The Judge Ordinary subsequently refused to allow the case to be heard before a jury, but directed it should be heard before himself in *camera* ⁽¹⁾.

Attorneys for petitioner: *Denton, Hall & Baker.*

Attorneys for respondent: *W. Gibson & Sons.*

⁽¹⁾ In fact, from February, 1860, when the case of *H v. C.* was decided, until July, 1864, nullity cases were always heard in open court. In the case of *Marshall v. Hamilton* (3 Sw. & Tr., 517) the

evidence was of such an offensive character that Sir J. Wilde signified a desire that for the future they should be heard in *camera*, and with the consent of counsel ordered that they should be so.

[Law Reports, 3 Probate and Divorce, 233.]

Feb. 18, 1875.

233]

*BLAND V. BLAND.

Matrimonial Suit—Respondent in Prison—Substituted Service—Practice.

• If the respondent be in prison, the court will not be satisfied with substituted service of the petition and citation to be made on an official of the gaol in which he is confined, unless there is a reasonable probability that the contents of those documents will thereby become known to the respondent.

In this case Mrs. Mary Bland presented a petition for a dissolution of her marriage with John George Bland by reason of his adultery and cruelty, and prayed for the custody of two children, the issue of the marriage. A citation was taken out on the 27th day of January last, but in consequence of the respondent being confined in the convict prison of Portland Island, personal service could not be effected in the usual way. Application was, therefore, made to the governor of the prison for an appointment to enable

a personal service to be effected, and he referred the applicant to the secretary of state to obtain an authorization to that effect. The secretary of state refused to grant permission for the personal service upon the convict of the petition and citation.

Searle moved the court to substitute some other service in lieu of personal service. By rules 10 and 13 citations are to be served personally when that can be done; but in cases where personal service cannot be effected, application is to be made to the Judge Ordinary to substitute some other mode of service.

[THE JUDGE ORDINARY: What service do you propose in lieu of personal service?]

Searle would leave that to the court to direct, but he thought that at any rate a copy of the citation and petition should be left with the governor of the gaol.

THE JUDGE ORDINARY: This is a question of some importance. A suitor ought not to be deprived of his remedy in this court by the fact that the defending party has been sentenced to a long term of imprisonment. This lady ought to have some means of prosecuting her suit; on the other hand, it is a principle from which it is impossible to depart, that where one party has *instituted proceedings of [234 this kind, the other should have knowledge of them and an opportunity to defend himself. The object of substituted service is to provide the best means under the circumstances for bringing to the knowledge of the accused party the fact of proceedings having been instituted against him, either when he is keeping out of the way or his whereabouts is not known. This case does not, however, come within either of these classes. The respondent is not wilfully keeping out of the way, and his whereabouts is perfectly well known. There is no information before me to satisfy me that if these documents were served upon the governor they would come to the knowledge of the convict. As far as I know, it may not be customary to communicate such matter to the prisoners, and it does not necessarily follow that the service of them upon the governor or other official will bring the fact to the mind of the respondent that his wife has instituted proceedings against him. I therefore decline to make an order for substituted service at present, but it may turn out that although the prisoner cannot be personally served, the knowledge of the proceedings may be brought to him through some official. The petitioner must make further inquiries, and if I find that there are means by which such

1875

Bland v. Bland.

a matter can be brought to the notice of the respondent, I will act on the information (').

Attorneys: *Boulton & Sons*.

(1) The petition and citation were afterwards personally served on the respondent in the prison.

If the plaintiff in a pending suit be convicted of felony, he is civilly dead, and such action by him abates: *O'Brien v. Hogan*, 1 Duer, 664; *Freeman v. Frank*, 10 Abb. Prac., 370.

But see *Harvey v. Jacob*, 1 Barn. & Ald., 159; *Barrett v. Power*, 25 Eng. Law and Eq. R., 524, 9 Excheq., 338, 2 Com. L. Rep., 488.

But a convicted felon may be made defendant, and process may be served upon him in state prison: *Davis v. Duffie*, 8 Bosworth, 617, 18 Abb. Prac., 360, affirmed 4 Abb. Prac., N. S., 478, 3 Trans. App., 54; 1 Abbott, Court Appeals Dec., 486, and numerous authorities cited by counsel; *Freeman v. Frank*, 10 Abbott's Prac. Rep., 370; *Phelps v. Phelps*, 7 Paige, 150; *Dunham v. Drake*, 1 New Jersey Law (Coxe) Rep., 315.

The case of *Graham v. Adams*, 2 Johns. Cas., 408, does not seem to be sound law.

It would seem that the service should be upon the convict personally, though

service of process in chancery, upon the keeper of the prison in which he was confined, has been held sufficient: *Johnson v. Johnson*, Walker's (Mich.) Chy., 309.

Service of an order on the turnkey for a prisoner in close custody, is not sufficient if it is intended to enforce obedience to the order by attachment: *Joyce v. Joyce*, 1 Hogan, 121.

He may appear by attorney: *Ramsey v. McDonald*, 1 W. Bl., 31, 1 Wils., 217; *Coffin v. Gunner*, 2 Lord Ray., 1572.

The practice in England seems to be to obtain leave from the court to serve upon a convict in prison. This would undoubtedly be necessary here where substituted service is allowed. Where, however, personal service is made, no such leave is necessary. As a matter of good faith to the court, however, the fact that the defendant is a convicted felon, and was served in prison, ought to appear by the proof of service.

CHANCERY APPEAL CASES

(INCLUDING BANKRUPTCY AND LUNACY CASES),

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

[Law Reports, 10 Chancery Appeals, 177.]

L. C. and L. J. M., Jan. 12, 14, 1875.

**In re* BRAMTON AND LONGTOWN RAILWAY COMPANY. [177]

SHAW'S CLAIM.

Railway Company—Contract with Promoters—Indemnity.

A solicitor who was promoting a railway company induced various persons to sign the subscription contract, by an assurance that they should incur no liability if the line was not made. Some of these persons were provisional directors. The act was obtained, and contained the usual clause that the preliminary expenses should be paid by the company. The line was not made. The undertaking was abandoned, and the company ordered to be wound up. The solicitor carried in a claim as creditor for professional services in obtaining the passing of the act. This claim was opposed by some of the contributories, on the ground of the above assurances:

Held (affirming the decision of Bacon, V. C.), that the solicitor was entitled to prove, for that the assurances made by him could only operate as a contract to indemnify the individuals to whom they were made, and did not exonerate the company in its corporate capacity.

Savin v. Hoylake Railway Company (1) distinguished.

THIS was a motion by way of appeal from a decision of Vice-Chancellor Bacon, allowing the claim of Mr. Shaw as a creditor in the winding-up.

The Brampton and Longtown Railway was projected before the year 1865. Messrs. Dodds & Hendry were the Parliamentary agents; and Messrs. Nimmo & McNay, engineers, Mr. Shaw, a solicitor, and Messrs. Boulton & Jones, railway contractors, all actively promoted the undertaking. Mr. Waugh, Mr. Dacre, Mr. Sutton, Mr. Graham, and Mr. Thomson, all of whom were owners of land on the projected line, consented to let their names appear as provisional directors upon receiving from Shaw and Nimmo & McNay a

Law Rep., 1 Ex., 9.

1875

In re Brampton &c. Railway Co. Shaw's Claim.

L.C. & L.J.M.

written guarantee against liability for any expenses incurred prior to the passing of the act. The usual subscription contract was prepared, and was signed by a considerable number of persons. The act was passed in 1866, and contained the usual clause that all costs, charges and expenses of and incident to the preparing for, obtaining, and passing [178] the act, or otherwise in relation thereto, should be paid by the company. It was found impossible to proceed with the undertaking; the construction of the line was never commenced, and it was abandoned under 30 & 31 Vict. c. 127. In December, 1869, an order was made under 32 & 33 Vict. c. 114, for winding up the company.

The only creditors were four—Mr. Shaw, who carried in a claim for £858 5s. 6d. for professional services; Messrs. Nimmo & McNay, who claimed £1,000 for engineering work; Mr. Dodds, who claimed £879 13s. 6d. for professional services as Parliamentary agent; and Mr. Boulton, who claimed for moneys advanced, and for compensation for loss of the contract which had been entered into with him for making the line.

The claim of Shaw having been allowed by Vice-Chancellor Bacon, an appeal was brought by fifty-six persons, who, having signed the subscription contract, had been placed on the list of contributories.

The resistance to Shaw's claim was on the ground of certain representations made by him, or on his behalf, to some of the persons who signed the subscription contract, and thereby agreed to take shares. Mr. Waugh, one of these persons and one of the provisional directors, after stating his refusal at first to sign the contract, proceeded to depose as follows:

"I afterwards saw the said W. H. Shaw in London, and had a long conversation with him, when he repeatedly assured me the line would be made, and that I need have no hesitation in signing the contract, which would be of great service both with Lord Redesdale and the large companies, and that the same contract, if signed, would not be used or acted on unless the line were made. Upon such representations I at length agreed to place my name on the contract for shares, knowing that the value of my land would more than cover my subscription. The said William Norris" (a clerk of Shaw's) "at the same time frequently assured me that I should not be called on for a penny unless the line was made; and that the contract was only for the purpose of getting the bill safely passed."

Various persons had signed the subscription contract be-

fore Mr. Waugh did so, but under what circumstances did not appear.

*Mr. Graham, another provisional director, deposed [179 "That the said W. Norris, amongst other representations made to induce me to take shares and sign the subscription contract, assured me that I should not incur any responsibility whatever by signing the said subscription list; that the sole object was to meet a requisition of Lord Redesdale, and show that the project was supported by persons resident in the neighborhood through which the line would pass; and that if the scheme was not carried out I should not be called upon to pay one penny of expenses." In a subsequent affidavit he stated: "The said W. Norris solicited my signature to a subscription list to take shares in the said company, but I declined to subscribe until positively assured that I should not incur any liability, either as a provisional director or shareholder in respect of the said shares, for expenses, or otherwise, if the undertaking was not carried out."

Mr. Sutton, another provisional director, also deposed that he agreed to take shares on the positive assurance of Norris that he should not be called upon or be liable for anything whatever unless the line was made.

Carrick and Lee stated that they agreed to sign the subscription contract on the positive assurance of Norris "that if the undertaking should not be carried out the subscription contract should be considered null and void, and that we should not be called upon to contribute a penny unless the proposed undertaking was carried out." There was evidence to the like effect by some other persons who had signed the subscription contract.

Mr. *Fry*, Q.C., and Mr. *T. L. Wilkinson*, for the appellants: The case is governed by *Savin v. Hoylake Railway Company* (¹). The persons to whom the representations were made were provisional directors, and the representations were made to them as agents on behalf of the company. But if the engagement was with these persons only as individuals, the result is the same. They were not to be called upon to pay anything, and the persons who made such an engagement with them cannot be allowed to bring a liability upon them indirectly by enforcing payment out of a common fund to which they must contribute.

*Mr. *Kay*, Q.C., and Mr. *Smart*, for Shaw, were not [180 called upon.

Mr. *Millar*, for the official liquidator.

(¹) Law Rep., 1 Ex., 9.

1875

In re Brompton &c. Railway Co. Shaw's Claim.

L.C.&L.J.M.

LORD CAIRNS, L.C.: Mr. Shaw makes a claim against the Brompton and Longtown Railway Company, in its liquidation, for payment for professional services performed by him in respect of the passing of the act by which the company was incorporated. The railway has been abandoned under the statutory powers enabling a company to abandon a line. The present appeal is not by the official liquidator, but it is by certain persons who are alleged to be and may hereafter be decided to be contributories, and who, *prima facie* at all events, as being parties to the subscription contract, are shareholders in the company; and they resist this claim, putting themselves in the position of the official liquidator, and in point of fact asking to be heard to do more strenuously what they consider he has not himself done with the energy which he ought to have shown.

I point out that this is the position of Mr. Fry's clients for the purpose of showing that they cannot advance any argument here for the purpose of resisting this claim which the official liquidator could not advance. They must stand, to all intents and purposes, in his place in resisting the claim; and, therefore, what they must show is, that Mr. Shaw is not entitled, in respect of these professional services, to maintain any claim whatever against the company, for the question is not as to the *quantum* of the claim. Now, if it had been established that Mr. Shaw, although he rendered professional services to the company, had, notwithstanding, contracted to hold the company harmless against all claims whatever, including his own, I should have been of opinion that a contract of that kind, whether made with the company directly or made with persons representing the company, for the purpose of its enuring to the benefit of the company, would have been a sufficient answer to the claim made by Mr. Shaw; and if the contract had appeared to be, not an absolute contract, in all events and under all circumstances, to hold the company harmless against his own and all other claims, [181] but a contract to hold the company harmless *against these claims if the line should not be made, I should also have been inclined to hold that the line not having been made, that contract would also have been an answer to a claim made by Mr. Shaw for his professional services. But, for a contract of that kind to be a defence to such a claim, it is essential that it should be a contract made with the company; because, if allowed as a defence at all, it must be upon the principle, either that Mr. Shaw had undertaken, in the event mentioned, not to charge for his work or labor at all, or that, in the same event, he had undertaken to indemnify the

company against all claims, in which latter case this court, to avoid circuitry of action, would give effect to the contract of indemnity in the winding-up without putting the parties to an action of indemnity which would in the end result in giving back to the company everything which the company had paid.

But then arises the question whether, assuming the evidence tendered on behalf of the appellants not to be contradicted, there is in that evidence any proof of a contract to indemnify the company. They put the case in two ways. In the first place it is said that what took place—what was said either by Mr. Shaw or by Mr. Norris on his behalf to individuals such as Mr. Waugh, was said to those individuals, not as individuals, or merely for their own benefit and protection, but for the purpose of its enuring to the benefit of the persons who might take shares in the company, and therefore to the company itself; and in particular that some of those conversations took place with those who in the subscription contract were entitled to style themselves promoters of the company, and being made with them, the contract was a contract enuring to the benefit of the company. Now, as to this argument, I must say that the conclusion which I draw from the whole of this evidence, after a very careful perusal of it, is that, even if the evidence be accepted as uncontradicted, nothing whatever was said to any of these individuals otherwise than as individuals. What was said was said because individuals were making objections, were demurring to placing themselves under responsibility by signing the subscription contract; and it was said in order to allay the apprehensions of individuals, and to assure them that they, as individuals, would not be called upon to make payments if the bill did not pass. That may [182 be a contract to indemnify individuals, but cannot, in my opinion, amount to a contract to indemnify the company. But then the argument was put in another way. It was said that, even assuming what took place to be an engagement with an individual to indemnify him, or rather not to call upon him for payment, inasmuch as that individual could only be called upon for payment by his contribution to a common fund, an engagement not to call upon a contributory to the common fund is virtually an engagement not to call upon any person whatever to contribute to that fund, and is therefore an engagement not to call upon the company to pay. I do not think that is an argument which can prevail. If the words said to be used would actually in law have that effect, it appears to me that, inasmuch as the

1875

In re Brampton &c. Railway Co. Shaw's Claim.

L.C.&L.J.M.

object of using the words clearly was, in my opinion, merely to allay the apprehension of the individual, the duty of the court, if there were any doubt about it, would be to mould the words used so that they should not go further than what was intended. If the intention was to protect the individual, and not to indemnify the company, the words, even if amounting to an engagement not to call upon the common fund, which in my opinion they do not amount to, would be read by the court as an engagement to indemnify the individual who would have to contribute to that common fund.

Now, all that I have said proceeds upon this supposition, that the evidence tendered on behalf of the appellants, is to be accepted as uncontradicted, and taken as literally accurate; and, viewing it in that way, which is of course the most favorable way for the appellants, the evidence, in my opinion, does not amount to anything which would entitle them to say more than that there has been an engagement to indemnify certain persons as individuals. Whether there has been any engagement to indemnify any persons as individuals, I express no opinion whatever. This is not the time nor the place in which that is to be decided. This is a question simply between Mr. Shaw and the company; and whether a claim for an indemnity to Mr. Waugh or to any other individual can be supported at all upon the facts, whether it can be made and effect given to it in the course of this winding-up, or whether it ought to be made and effect [183] given to it in some other proceeding, it is not *for us now to express any opinion. All these questions we are obliged to leave entirely open. All that, in my opinion, we can do now is to say, there being no question of *quantum*, that Mr. Shaw is entitled to maintain his claim for the amount which has been allowed; and that there is no answer to the claim in the arguments urged on behalf of the appellants.

SIR G. MELLISH, L.J.: I am of the same opinion. There appear to be two questions to be determined; one to a certain extent a question of fact, and the other a question of law. Now, the first question is whether, assuming all this evidence which has been brought before us to be true, it is to be considered as establishing that before the act was obtained an agreement was made by Mr. Shaw with any promoter of the company on behalf of the company that he, Mr. Shaw, in the event of the line not being made, would not call upon the company to pay any of his costs or charges. The act of Parliament says that the costs and charges of

obtaining the act are to be paid out of the funds; and although I do not say that an agreement such as in *Savin v. Hoylake Railroad Company*⁽¹⁾ may not be proved, that a person agreed to give services in obtaining the act for nothing, yet unquestionably there ought to be very clear evidence to prove that such a contract was made.

I entirely agree with what the Lord Chancellor has said, that here the evidence given on behalf of the appellants only amounts to this, that at the time when certain individuals signed the subscription contract a representation was made to each of them that he should not himself be put to any charges by reason of his signing the subscription contract unless the line was made.

Now the part of the case which was most strongly relied upon was the contract with Mr. Waugh. It was said that this contract with Mr. Waugh, he being a promoter, and being one of the provisional directors, was a contract made with him on behalf of the company, intended to enure on behalf of the company if the act was obtained. It appears to me by the evidence, and Mr. Waugh's own statement, to be clear that the contract he obtained, *if he did obtain [184 any, was not one for the benefit of the company, but for his own individual benefit. He says: "I then gave the said William Norris a memorandum that I would, in the event of the line being made, take the value of the land in shares. I afterwards saw the said W. H. Shaw in London, and had a long conversation with him, when he repeatedly assured me that the line would be made, and that I need have no hesitation in signing the contract, which would be of great service both with Lord Redesdale and the large companies, and that the said contract, if signed, would not be used or acted on unless the line were made. Upon such representation I at length agreed to place my name on the contract for £250." Now a great number of persons had signed before that. I assume that those persons had signed in the ordinary way, so as to be liable for the expenses if the act was obtained. Looking at what passed between Mr. Shaw and Mr. Waugh, assuming that everything Mr. Waugh says as to this conversation is perfectly true, it is not to be supposed it was intended to relieve any other person who had chosen to sign the subscription contract without requiring any indemnity such as Mr. Waugh says he got. It appears to me that the utmost conclusion you can come to is that Mr. Waugh himself was to be relieved. Indeed it is admitted that to a great extent

(1) Law Rep., 1 Ex., 9.

1875

In re Brampton &c. Railway Co. Shaw's Claim.

L.C.&L.J.M.

the contract can only operate by way of indemnity, for that if any other person besides Mr. Shaw has a claim against the company for expenses, those expenses must be paid. It is admitted that the persons who signed the subscription contract, and agreed to be shareholders, must be contributors, and that those expenses must be paid out of the calls they pay, and that their only remedy is that they would be entitled to be indemnified by Mr. Shaw. So also as regards any expenses for winding up. If it be true that the contract went to such an extent that under no circumstances, if the line were made, could a person with whom it was entered into be put to the expense of one farthing by reason of having signed the contract, that also must be by way of indemnity. So also as to Mr. Shaw's own claim. There is nothing in the contract to discharge persons who have agreed to become shareholders in the ordinary way without requiring any indemnity.

Then the only question is a question of law, which was [185] argued *by Mr. Fry. He urged that if any one person was discharged, then the whole company might avail themselves of it. I do not at all agree in that. He seemed to think that that was decided by the case of *Savin v. Hoyalake Railway Company*(¹). But in that case there was most clearly alleged a contract on behalf of the company, because what was said was that the plaintiff before the application to Parliament induced certain persons to become promoters of the company upon the faith of an express agreement between the plaintiff and the said persons that he, the plaintiff, would bear and pay all the costs, charges, and expenses of applying for and obtaining and passing the said act, and in relation thereto; and that neither the said persons, nor the said company when incorporated, nor any other person, should be liable for the charges and expenses to the promoters for the payment to him of the same or any part thereof. It was, therefore, expressly stated, as part of the agreement, that the company when incorporated should not be liable, and the true ground of the decision is plainly this, that the court, as a matter of construction, held that the words "charges and expenses" in the act of Parliament did not include charges and expenses which a man had voluntarily incurred on the express agreement that he was not to be paid. It is perfectly impossible to say in this case that the charges and expenses now in question are not within the act at all, because under certain circumstances it is admitted that they were to be paid; but I would not rely on

(¹) Law Rep., 1 Ex., 9.

that, because if there had been an agreement with the promoters on behalf of the company, that in case of the line not being made and of the company being wound up the expenses were not to be paid, although they were to be paid in another event, I think that that contract would have been carried out in the winding-up; but I am not aware of the slightest authority for holding that because any one individual out of twenty subscribers is not to be liable, therefore the other nineteen are to be excused. If the liability were joint, that possibly might be so; but the corporate liability of a company is a totally different thing. There are shareholders who, of course, are not directly liable to the payment of costs, they are only liable for ^{the} payment [186 of calls to the company. I am not aware of any authority for holding, and in the absence of authority I should not hold, that because a person has agreed that a particular shareholder shall not bear any portion of the charges that he is entitled to have against the company, that therefore the whole company is not liable.

Solicitors: Messrs. *Tahourdins & Hargraves*; Mr. *Joseph Thompson*; Messrs. *Ashurst, Morris & Co.*

As to subscriptions for stock of a company procured by fraud see 1 Eng. Rep., 611 note.

An agreement made by the promoter of a corporation that a subscription to stock shall create no liability against the subscriber, or that in a certain contingency a note given for the organization of a mutual insurance company is not binding upon the corporation, when organized. A surrender of the sub-

scription or of such notes is invalid, and does not extinguish the subscriber's liability: *Angell & Ames on Corp.*, § 523; *Anderson v. Newcastle, etc.*, 12 Ind., 376; *Burnham v. N. W. Ins. Co.*, 36 Iowa, 632; *Collins v. Swan*, 7 Rob., 623; *Sands v. Hill*, 42 Barb., 651; *Payson v. Withers*, 5 Bissell, 269.

But see *Edwards v. Grand Junction, etc.*, 1 Myl. & Cr., 559, S.C. 7 Simons, 337.

[Law Reports, 10 Chancery Appeals, 192.]

L.JJ. Jan. 16, 1875.

*In re GORDON (a Lunatic).

[192

Lunacy—Proceedings to impeach Settlement by Lunatics.

A gentleman made a settlement of nearly the whole of his property in trust for himself for life, and then for four of his five children and their issue. About two years afterwards he was found lunatic. A son who took no benefit under the settlement desired to have it impeached, and adduced evidence showing that there was reasonable ground for contending that the settlor was of unsound mind when he executed it. The income of the lunatic was amply sufficient for his wants:

Held, that no proceedings ought to be directed at the expense of the lunatic's estate, but that the excluded son ought to be allowed to file a bill, as next friend of the lunatic, without giving security for costs, to impeach the settlement.

THE question in this case was as to taking proceedings to set aside a voluntary settlement made by the lunatic.

The lunatic was found such by inquisition on the 17th of February, 1874.

The settlement in question was a deed dated the 4th of December, 1871, made between Thomas Birch Gordon (the lunatic) of the one part, and Thomas Birch Gordon, George Lea Malcolm Gordon, and Christina Hill, of the other part, by which, after reciting the title of Thomas Birch Gordon to foreign bonds for sums amounting to £16,000, and to a sum of £2,000 and upwards at his bankers, Thomas Birch Gordon settled the bonds and £2,000 of the balance at the bankers upon trust for himself for life, and after his decease, as to so much as would raise £4,400 cash, upon trust for Malcolm Gordon or his wife and children, as therein mentioned; as to £3,000 cash, upon trust for Christina Hill during her life, and then for her children, and in default of children, as to one moiety, for the children of Malcolm Gordon, and as to the other moiety, in trust for the children of Ronald Gordon; and as to £2,000 cash, upon trust for Laura Christina Alison for life, and then in trust for her two sons; and as to £3,000 cash, upon trusts for Hamilton Gordon and his wife and issue. The settlor covenanted that if the trust funds should be insufficient to provide the [193] above sums, his executors should make up the *deficiency; and if his estate was insufficient to do so, then the beneficiaries were to abate ratably. This deed reserved no power of revocation, and it comprised the bulk of the settlor's property, his whole income being about £947 per annum.

The lunatic's children and next of kin were Hamilton Gordon, Malcolm Gordon, Ronald Gordon, Christina Hill, and Laura Christina Alison. He was himself a widower of the age of eighty-six.

Ronald Gordon, who, as will be seen, was the only child of the lunatic who took no benefit under the settlement, was desirous of impeaching it, and carried in a proposal before the master for taking steps to have it set aside.

The master, by his report, proposed an allowance of £500 a year for the lunatic's maintenance, and £100 a year for the maintenance of Mrs. Alison; who had been maintained by her father at an asylum. As to the settlement, he was not of opinion, having regard to the lunatic having a life estate, and to the conflict of evidence, that proceedings ought to be taken to avoid the deed, but he submitted the point to the judgment of the court.

A petition was now presented by the committee for the confirmation of the report in other respects, and for the direction of the court as to this deed. Ronald Gordon adduced strong evidence to show that the lunatic was of unsound mind when the deed was executed, which was met by counter-evidence on the part of the other children.

Mr. *Eddis*, Q.C., and Mr. *Graham Hastings*, for the committee, submitted the point to the court.

Mr. *Jackson*, Q.C., and Mr. *W. W. Karslake*, for Ronald Gordon, asked that a bill might be filed to set aside the deed, or a bill to perpetuate the testimony of witnesses as to the settlor's state of mind at the time of its execution. They referred to *In re Tayleur* (').

Mr. *Karslake*, Q.C., and Mr. *Dauney*, for the other children.

Their Lordships declined to give any directions for trying the *validity of the settlement at the expense of the [194 estate, but considered that as a case was made showing that there was reasonable ground for impeaching it, any person interested in doing so ought to be allowed to impeach it at his own risk, which their Lordships considered a more proper mode of proceeding than a bill to perpetuate testimony. Leave was accordingly given to Ronald Gordon to file a bill, as next friend of the lunatic, to impeach the settlement, their Lordships intimating their opinion that the committee of the estate must be a formal defendant, but ought not to take any part in the contest. Their Lordships also held that the next friend ought not to be required to give security for costs.

Solicitors: Mr. *H. W. M. Jackson*; Mr. *W. H. Oliver*; Messrs. *Hooke & Street*.

(') Law Rep., 6 Ch., 416.

[Law Reports, 10 Chancery Appeals, 194.]

L.JJ., Jan. 18, 1875.

In re EMMA SILVER MINING COMPANY.

Winding-up Petition—Cross-examination of Secretary—Production of Company's Books on Cross-examination—Subpoena duces tecum.

A petition for winding up a company having been presented by a shareholder, the secretary filed an affidavit in opposition to the petition, and was cross-examined by the petitioner before a special examiner. On his cross-examination, he was called on to produce the books of the company, which he refused to do. Malins, V.C., accordingly, on the application of the petitioner, made an order that the company, by their

1875

In re Emma Silver Mining Company.

L.JJ.

secretary, should produce before the special examiner, upon the cross-examination of the secretary, the books and papers which they had had notice to produce:

Held, that the petitioner had a right to the production of the company's books and papers on the cross-examination of the secretary for the purpose of testing his evidence, but for no other purpose; and that the order of Malins, V.C., was right both in form and substance.

THIS was an appeal from a decision of Vice-Chancellor Malins.

On the 6th of October, 1874, a petition was presented by H. W. Askew for winding up the Emma Silver Mining Company, Limited.

The petitioner was the holder of 100 fully paid-up shares of £20 each in the company. He alleged misrepresentation in the prospectus and misconduct on the part of the directors, and submitted that the company was a bubble company brought out and *promoted by various schemes and devices to cheat and defraud the petitioner and others, and that it was for the public good that an examination under the control and direction of the court should be had into the conduct of the original directors and promoters and the vendors of the mine; and he also submitted that the company was unable to pay its debts.

The secretary of the company, Mr. W. H. Tooke, filed an affidavit, in which he denied many of the allegations in the petition, and adduced facts exculpating the present directors. He was cross-examined upon the affidavit, and on his cross-examination was served with a notice to produce the books of the company, which he refused to do.

The petitioner moved before the Vice-Chancellor that the secretary might be ordered to produce the books on his cross-examination. His honor made an order to the following effect: "That the above-named company, by Mr. W. H. Tooke, their secretary, produce before the special examiner appointed in these matters, upon the cross-examination of the said W. H. Tooke on his affidavit made in these matters on behalf of the said company, and as their secretary, and filed on the 4th of November, 1874, all the books and papers mentioned in the notice to produce dated the 26th of November, 1874, given to the said W. H. Tooke, or such of the said books and papers as may be in the possession or power of the above-named company." And his honor directed the costs to be costs in the winding-up.

From this order the company and Mr. Tooke appealed.

Mr. J. Pearson, Q.C., and Mr. Colt, for the appellants: If this order is regarded as an order in the nature of a *sub-pœna duces tecum*, it is irregular. The books do not belong to the witness, who is the secretary of the company, nor has

he power to produce them. But the order is in fact an order against the company for discovery by production of their books and documents. A shareholder, as such, has no right to inspect the books of the company, and the court has no power to make such an order on a winding-up petition until an order for winding up has been made, after which an application may be made for production of documents under the 156th section of the Companies *Act, 1862. A pe- [196
titioner in a winding-up petition is not in the same position as a plaintiff in a suit. He must establish his right to an order strictly by his own evidence, and cannot ransack the books of the company to assist him in making out a case. In the present case the petitioner is a fully paid-up shareholder, and has no *locus standi* to present such a petition, unless he can make out a case of fraud against the company: *In re Lancashire Brick and Tile Company* (*). He has produced no evidence in support of the allegations in his petition except the formal affidavit required by the statute, and he now seeks to supply the deficiency of evidence by searching the company's documents.

Mr. Cotton, Q.C., and Mr. Graham Hastings, for the petitioner: The petitioner is not in the position of an ordinary shareholder. He has commenced a litigation against the company, and ought to be in the same situation as if he had filed a bill on behalf of himself and the other shareholders: *Attorney-General v. Mercers Company* (*). But in reality, this is not an order for discovery, but simply an order, in the nature of a *subpœna duces tecum*, for the production of the books from which the witness gets his knowledge of the facts he asserts, in order to test his evidence on cross-examination. He is put forward by the company as their mouth-piece, and they cannot refuse to allow his evidence to be tested by their books. We ask no more than would be ordered as a matter of course by the judge at a trial at *nisi prius*.

Mr. Pearson, in reply.

SIR W. M. JAMES, L.J.: I am of opinion that the Vice-Chancellor's order is right in substance, and right also in form—if it is necessary to decide that point. It is not a question of discovery at all. It is an ordinary order for production of documents on the cross-examination of a witness. The judgment of the Vice-Chancellor seems in some passages to treat the question as one of discovery. But Mr. *Cotton relied on the order as really made and drawn [197
up, which is simply an order for the production of docu-

(*) 34 Beav., 330.

(*) 9 W. R., 83.

1875 In re Barned's Banking Co. Ex parte Joint Stock Discount Co. LJJ.

ments on the cross-examination of a witness. The power of making such an order exists in this court in the same manner and with the same restrictions as in a common law court in an action at *nisi prius*. A witness having been called, it is desired to test his evidence by cross-examination, and for that purpose it is desired to put in his hand books, papers, and documents, either in his own control or in that of the party to the cause in whose behalf he is examined. The Vice-Chancellor has made an order in this case, that the books must be produced that they may be dealt with as if before a judge and jury at *nisi prius*. It is clear that there is to be a limit to the power of inspection: a person must not read them for his amusement, but they are to be dealt with as at a trial at *nisi prius*. That is the nature and the limit of the right of the petitioner under this order. The order is right, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.: I am of the same opinion. It is impossible to say, as we must say if we allow this appeal, that none of the books can be of any use in the cross-examination of this witness. In his affidavit he has sworn to some things which he cannot know except from the books. He is cross-examined as to them; he appeals to the entries in the books. It is idle to contend that what he has said is not to be tested by the books. The petitioner is entitled, on his cross-examination, to have the books there; but to what extent he is entitled to use them cannot be decided till the course of the cross-examination is known.

Solicitors: Messrs. *Sale, Turner & Knight*; Messrs. *Harper, Broad & Ballcock*.

[Law Reports, 10 Chancery Appeals, 198.]

LJJ., Jan. 18, 1875.

198] *In re BARNED'S BANKING COMPANY.

Ex parte JOINT STOCK DISCOUNT COMPANY.

Securities for Bills of Exchange—Double Insolvency—Doctrine of Ex parte Waring—Application of Securities—Reduction of Proof.

All the parties to certain bills of exchange, the payment of which was secured as between some of them, became insolvent—one of them (a company) being ordered to be wound up. The securities were realized, and the proceeds paid to the bill-holders, upon the principle of *Ex parte Waring*⁽¹⁾. After the bills had matured, but before the securities were realized, the holders had proved against the company for the full amount:

(¹) 19 Ves., 345.

Held (affirming the decision of the Master of the Rolls), that the proof must be reduced by the amounts received by the bill-holders from the securities, and any dividends received on the excess of the original over the reduced proof must be refunded.

THIS was an appeal from a decision of the Master of the Rolls (¹). The question arose on an application by the Joint Stock Discount Company that certain sums might be paid to the Joint Stock Discount Company by the liquidators of Barned's Banking Company as further dividends on certain bills of exchange which had been proved in the winding-up of Barned's Banking Company.

The bills in question had been indorsed by (amongst other persons) Barned's Banking Company and the payment thereof had been secured by mortgages of one or other of the following ships: the *Juventa*, the *Gambia*, the *Lady Rowena*, the *British Princess*, and the *Queen Victoria*. In every case, the drawers, acceptors, and indorsers of the bills had become insolvent, and the bills having come to maturity had been proved against the estates of all of them by the holders. The claims of the holders had been satisfied partly out of the proceeds of the sale of the ships, and partly by dividends paid by the liquidators of the Joint Stock Discount Company. This company, which was now in liquidation, had indorsed the bills subsequently to the indorsement of Barned's Banking Company, and had now become entitled to the benefit of the proofs against the drawers, acceptors, and prior indorsers of the bills.

*The particulars of the mortgages of the various [199 ships are given in detail in the previous report.

Neither the Joint Stock Discount Company nor the parties to whom they had indorsed the bills took any transfer to themselves of the benefit of any of their securities. The payments to the bill-holders out of the proceeds of the securities were all made after proof.

The liquidators of Barned's Banking Company insisted that the proofs in respect of the bills now held by the Joint Stock Discount Company ought to be reduced by the amounts paid to the bill-holders out of the proceeds of the sale of the ships; and they had paid to the Joint Stock Discount Company dividends on the amount of the proofs so reduced. The Joint Stock Discount Company, on the other hand, claimed to be entitled to receive the dividends on the full amount of the proofs.

The Master of the Rolls refused to allow the claim; and the Joint Stock Discount Company appealed from this decision.

(¹) Law Rep., 19 Eq., 1.

1875 In re BARNED'S BANKING CO. Ex parte JOINT STOCK DISCOUNT CO. L.JJ.

Mr. Romer (Mr. Roxburgh, Q.C., with him), for the appellants: We do not come strictly under the rule of *Ex parte Waring* (*), but under the equitable doctrine laid down in *Powles v. Hargraves* (†) and *City Bank v. Luckie* (‡). These payments must either be treated as made on account of securities of the bill-holders, or as voluntary payments. If the securities were the securities of the bill-holders, we come under the rule that in chancery and in winding-up a creditor may receive payments in respect of the realization of a security after proof, without reducing the amount of his proof. The cases relied on by the other side, *Coupland's Claim* (†) and *Banner v. Johnston* (†), are distinguishable, for in both of them the creditor who proved was party to a security which provided that the debtor was only to be liable for the difference between the debt and the proceeds of the property comprised in the security. Here, neither the Joint Stock Discount Company nor the parties who proved have [200] entered into any such contract. *It is therefore more correct to treat what they received as voluntary payment: and even in bankruptcy a proof is not reduced in consequence of such a payment.

Mr. Southgate, Q.C., and Mr. Kekewich, for BARNED'S BANKING COMPANY, were not called on.

SIR W. M. JAMES, L.J.: I am of opinion that the decision of the Master of the Rolls in this case is quite right. His decision is this, that the case is governed by *Ex parte Waring* (*), that is to say, that the bill-holder was entitled to the benefit of the security which he had not got himself, and as to which he had made no contract. The case of *Ex parte Waring* is now settled by this court. It is a case, I may say, *positivi juris*. It is an actual decision, and is the authority by which the court has been governed ever since, both in bankruptcy and equity.

That case decided that a bill-holder is entitled to the benefit of the security upon these terms—that the security is to be applied *ab initio* in reduction of the debt from which he gets by good fortune this benefit. That is what was done in *Ex parte Waring*, and in every one of the other cases. The Master of the Rolls says, in effect, in this case: “If I apply *Ex parte Waring* for the benefit of the bill-holder, the bill-holder must take it with the limitation and under the conditions expressed in the order in *Ex parte Waring*, that is to say, the security is to be considered as having been

(*) 19 Ves., 845.

(†) 3 D., M. & G., 430.

(‡) Law Rep., 5 Ch., 773.

(*) Law Rep., 167.

(*) Law Rep., 5 H. L., 157.

applied in the first instance." I have no disposition myself to give a bill-holder any further benefit from that than he has already obtained under it.

SIR G. MELLISH, L.J.: I am entirely of the same opinion. It appears to me that if any other rule prevailed, we should be taking away from the persons who really owned the security the value of it. As it is, they only get it very imperfectly, but still, to a certain extent, they do get it by the diminution of the sum which may be proved against the estate. If it were not to be diminished, it might wholly, in some cases, be given to the bill-holder, and taken away from them altogether. It is entirely a question, as the Master of the Rolls says, turning upon the terms on which the court will allow the bill-holders to have the proceeds of the security. I am clearly of opinion they ought only to be allowed to have it upon the terms of the proof being reduced. The appeal must be dismissed with costs.

Solicitors: Mr. W. Trinder; Messrs. Freshfields & Williams.

[Law Reports, 10 Chancery Appeals, 211.]

L.JJ. Jan. 15, 29, 1875.

*Ex parte JACOBS. In re JACOBS.

[211

Principal and Surety—Discharge of Surety—Bill of Exchange—Resolution to accept Composition from Acceptor—Discharge of Drawer—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 125, 126.

Where the acceptor of a bill of exchange presents a petition for liquidation or composition under the Bankruptcy Act, 1869, and the creditors pass a resolution for liquidation or composition, the acceptor must be considered as discharged by operation of law, and the drawer is thereby not discharged from his liability. In such a case it makes no difference whether the bill-holder is present at the meeting or not, or whether he votes in favor of the resolution or against it.

Mcgrath v. Gray ⁽¹⁾ followed.

Wilson v. Lloyd ⁽²⁾ disapproved.

THIS was an appeal from a decision of Mr. Registrar Spring Rice, sitting as Chief Judge in Bankruptcy, by which he adjudicated Sidney Jacobs a bankrupt.

On the 13th of April, 1874, Jacobs drew a bill of exchange upon Samuel Phillips for £100, payable at two months. This bill was indorsed by Jacobs to James Martin for value.

On the 1st of June, 1874, Phillips filed a petition for

⁽¹⁾ Law Rep., 9 C. P., 216.

⁽²⁾ 6 Eng. R., 642.

liquidation. At the first meeting of creditors, which was held by adjournment on the 14th of July, a resolution was passed by the requisite majority of creditors agreeing to accept a composition of 5s. in the pound. Mr. Butcher, Martin's solicitor, attended this meeting on his behalf, and opposed the resolution, but at the second meeting, held on the 24th of July, Mr. Butcher, on his behalf, signed the resolution confirming the resolution passed at the first meeting. Mr. Butcher stated in his affidavit that he signed the resolution because he saw that it would have been carried by a majority of the creditors without his consent; and also because Jacobs, the drawer of the bill, had himself filed a petition for liquidation, which was expected to be agreed to by his creditors. Mr. Butcher also stated that Jacobs was aware at the time that he was attending the meeting of the creditors of Phillips on behalf of Martin, and that he intended to obtain such composition.

Jacobs filed a petition for liquidation on the 19th of June, 212] and *the first meeting of his creditors was held on the 9th of July, and was adjourned from time to time, but no resolution for liquidation or composition having been agreed to by his creditors, Martin filed a petition for adjudication against him on the 25th of August, 1874, the debt alleged being the sum of £100 due from him as the drawer of the bill of exchange, and the act of bankruptcy being the presenting of the petition for liquidation.

On this petition Jacobs was adjudicated bankrupt, and he appealed from the order of adjudication.

Mr. *De Gex*, Q.C., Mr. *Winslow*, Q.C., and Mr. *E. C. Willis*, for the appellant: The case comes within the rule that a creditor cannot discharge his principal debtor without at the same time discharging the surety. He cannot make a bargain with his debtor which affects the liability of the surety. It might have been different if the bill-holder had voted against the composition. Or else a stipulation ought to have been introduced in the resolution expressly reserving the remedies against the drawer. *Wilson v. Lloyd* (¹), and *Cragoe v. Jones* (²) are authorities in our favor.

Mr. *Roxburgh*, Q.C., and Mr. *Lamaison*, for the petitioning creditor: This was not a voluntary proceeding on the part of the creditor. The resolution for composition derives all its power of discharging the creditor from the statute. It would have made no difference if the bill-holder in this case had voted against the composition. There was

(¹) Law Rep., 16 Eq., 60.

(²) Law Rep., 8 Ex., 81.

a majority of creditors without his vote. The proceedings under the 125th and 126th sections are all proceedings in bankruptcy, and the discharge under them operates in the same manner as a discharge under an adjudication. In such a case there is no question that the drawer of the bill would not have been discharged. *Megrath v. Gray* (1) and *Green v. Wynn* (2) are directly in point.

Mr. *De Gez*, in reply.

Jan. 29. SIR W. M. JAMES, L. J.: I have only to express my entire concurrence in the judgment *I am [213 about to read, which the Lord Justice (who is unavoidably absent) has been good enough to prepare.

This was an appeal from an order of Mr. Registrar Spring Rice, by which he adjudicated the appellant, Mr. Sidney Jacobs, a bankrupt. The ground of the appeal was, that there was no valid petitioning creditor's debt. The alleged petitioning creditor's debt consisted of a claim by one Martin in respect of a bill of exchange drawn by Jacobs upon one Samuel Phillips, and of which Martin was the holder. After the bill of exchange had been dishonored, and whilst both Phillips and Jacobs were liable to Martin on the bill of exchange, Phillips called a meeting of his creditors under the 125th and 126th sections of the Bankruptcy Act, 1869. At that meeting Martin, by his solicitor, attended; the proper majority of the creditors voted in favor of receiving a composition from Phillips, but Martin, by his solicitor, voted against accepting the composition. A second meeting of Phillips' creditors was duly held, when the resolutions in favor of the composition were confirmed, and Martin, on the occasion, voted in favor of the composition. The question to be determined is, whether Martin, by voting in favor of accepting a composition from Phillips, the acceptor, had discharged Jacobs, the drawer, and can no longer maintain an action against him on the bill. There can be no doubt that, if the holder of a bill, by becoming party to a deed or agreement, independently of any bankruptcy act, agrees to accept a composition from the acceptor, he thereby discharges the drawer; but, on the other hand, it is equally clear that if the acceptor is discharged from his liability by operation of law by becoming a bankrupt, the liability of the drawer to the holder is not thereby affected. We have now to consider whether the discharge of the acceptor under the 125th and 126th sections of the Bankruptcy Act, 1869, when the holder of the bill votes in favor of the liquidation or composition, is to be considered as a

(1) Law Rep., 9 C. P., 216.

(2) Law Rep., 4 Ch., 204.

discharge by the voluntary act of the holder, or a discharge by operation of law. In the case of *Wilson v. Lloyd* ⁽¹⁾ the Chief Judge held that a surety was discharged by the creditor voting in favor of accepting a composition from the principal debtor. There were, however, a great many points in that case; and we think that the difference between a composition by a voluntary deed or *agreement and by composition under the Bankruptcy Act, was not sufficiently considered. On the other hand, in the case of *Megrath v. Gray* ⁽²⁾ the Court of Common Pleas appear to have come, after great consideration, to a directly contrary conclusion. In that case, among the liabilities of the firm of Megrath & Highton were two acceptances; the partnership between the two was dissolved, Highton undertaking to pay all debts and indemnify Megrath. Highton filed his petition under the Bankruptcy Act, and the Adelphi Bank, the holders of the bills, voted in favor of the resolution, and it was held that they had not, by so doing, discharged Megrath.

We entirely agree in the decision of the Court of Common Pleas, and in the reasons they have given for it. We think that a discharge of a debtor under a liquidation or a composition is really a discharge in bankruptcy by operation of law. Where a creditor voluntarily agrees to a composition by deed or agreement with the acceptor, it is by his act alone that the acceptor is discharged and the position of the drawer altered. When, however, a debtor summons his creditors under the 125th and 126th sections of the Bankruptcy Act, 1869, the proper majority of the creditors have power to assent to the terms by which the debtor is to be discharged, whether the creditor who is the holder of the bill chooses to attend or not or chooses to vote or not. The consequence of holding that the holder of a bill could not vote at a meeting of the acceptor's creditors without discharging the drawer would be that in many cases a great number, and in some cases the majority, of the creditors could not vote at the meeting. On the other hand, if resolutions for liquidation by arrangement or for composition were to contain a reserve of remedies by the creditors against any other person than the debtor, the consequence would be that the debtor would not, either by arrangement or by composition, be completely discharged from any of his debts in respect of which the creditor had a remedy against any other person, which we think would be contrary to the intention of the act. On the whole, we are of opinion that

⁽¹⁾ Law Rep., 16 Eq., 60.

⁽²⁾ Law Rep., 9 C. P., 216.

the order of the Registrar must be affirmed, and the appeal dismissed with costs.

Solicitors: Messrs. *Hand, Son & Johnson*; Mr. *C. Butcher*.

Though the principal debtor be discharged in bankruptcy, a surety is not thereby discharged from liability: 11 Eng. Rep., 348 note; *Gregg v. Wilson*, 1 Law and Equity Reporter, 211, Sup. Court, Ind.; Theob. Pr. and Surety, 102; Bump on Bankr. (8th ed.), 574, 726; Pitman's Pr. and Surety, 180; *National Bank v. Booth*, 5 Bissell, 129.

And an action against a surety cannot be delayed until the final distribution of the assets in bankruptcy of the principal: *Gregg v. Wilson*, 1 Law and Eq. Reporter, 211, Sup. Court, Ind.

See *Merchant's Bank v. Comstock*, 55 N. Y., 24; *Matter of Jaycox*, 8 Bankr. Reg., 241.

[Law Reports, 10 Chancery Appeals, 218.]

L.JJ., Feb. 18, 1875.

**Ex parte HARE. In re ENGLAND.* [218

Bankruptcy—Proof of Debt—Vote for Trustees—Person appointed by the Court of Chancery—Bankruptcy Rules, 1870, rr. 67, 68.

A creditor of a bankrupt died before the commencement of the bankruptcy, and his estate was administered in chancery in a suit instituted by a creditor against the administratrix. The Court of Chancery appointed a person who was not the administratrix to prove the debt against the bankrupt's estate:

Held, that the person appointed by the court had a right to prove the debt, and also to vote for the appointment of a trustee at the meeting of creditors.

The 67th and 68th rules of the Bankruptcy Rules, 1870, only apply to ordinary cases, and not to proofs by persons appointed by the Court of Chancery or of Lunacy to represent the creditor's estate.

THIS was an appeal from a decision of Mr. Registrar Brougham, sitting as Chief Judge in Bankruptcy.

*The bankrupt, Philip Newberry England, in No- [219
vember, 1870, filed a petition for liquidation in the London Bankruptcy Court, and his creditors resolved to accept a composition of 8s. in the pound, and that resolution was duly confirmed and registered.

One of the creditors at the time was J. E. Guerra, a wine merchant in London, who claimed to prove for £5,075, due to him from England on certain bills of exchange and promissory notes. Some objections were raised to this proof, but it was ultimately allowed. This composition was never paid.

Guerra died on the 8th of July, 1874, intestate, and letters of administration of his estate were granted to his widow, Cecilia Guerra, who was a daughter of England. A suit was instituted in chancery for the administration of Guerra's estate by the Royal Oporto Wine Company, who were creditors to a large amount. On the 2d of December, 1874, an

order was made by Vice-Chancellor Hall in that suit on the application of the plaintiffs, by which the plaintiffs, or H. C. Hare, who was a clerk of their solicitors, on their behalf, should be at liberty to prove the debt due to the estate of the intestate by P. N. England, and to tender proof in the matter of the said P. N. England's then present or any future proceedings for liquidation by arrangement or composition with his creditors, or under any adjudication in bankruptcy against the said P. N. England, and that the said H. C. Hare should be at liberty to vote at the creditors' meetings in the present or any future proceedings for liquidation by arrangement or composition with his creditors, or under any adjudication of bankruptcy.

On the 8th of December, 1874, England was adjudicated a bankrupt, and on the 29th of January, 1875, the first meeting of creditors was held. On that occasion Hare tendered a proof for £6,026 for the original debt and interest, and claimed to vote on the appointment of a trustee. He filed an affidavit stating his appointment by the Court of Chancery, and stating that to the best of his belief the debt was still due to the estate of the intestate. One of the other creditors, and also the bankrupt, objected to the proof, on the ground that the greatest part of the debt had been paid off, and also that Hare was not the proper person to represent the creditor's estate. The Registrar was of opinion that Hare was not the proper person legally entitled to prove or 220] to *vote on the appointment of a trustee or otherwise, and that the proof was of such a nature as to demand investigation by the trustee when appointed; and he accordingly refused to allow Hare to vote, and ordered that the proof should be adjourned until after the appointment of the trustee.

From this decision Hare appealed.

Two trustees and a committee of inspection were appointed by the other creditors present, but the certificate of appointment was suspended to permit of the prosecution of the appeal.

Mr. *De Gez*, Q.C., and Mr. *F. Turner*, for the appellant: If the Registrar doubted the validity of the claim, or thought that it required more investigation before he admitted it, he ought to have admitted it as a claim, and allowed Hare to vote for the trustee, and adjourned the proof to a subsequent time: *Ex parte Simpson* ('). The objection made by the Registrar to the right of Hare to represent the estate of the creditor is unfounded. The 67th and 68th rules of the

(') 1 Atk., 68.

Bankruptcy Rules, 1870, and the form of affidavit to which they refer, only apply to the ordinary case where the creditor is alive and able to swear to the debt. Where an estate is being administered in chancery, the court constantly takes the matter out of the hands of the legal personal representative, and not only appoints a person to prove, but settles the amount of the debt for which he is to prove. And it makes no difference whether such person is the receiver of the estate or some other person specially appointed for the purpose. Instances of this being done are *Dornford v. Dornford* (¹); *Bick v. Motley* (²); *Ex parte Oxtoby* (³); and under the present act, *Armstrong v. Armstrong* (⁴); *Ex parte Westcott* (⁵).

Mr. Roxburg, Q.C., and Mr. J. E. Palmer, for the trustee: The 31st section of the Bankruptcy Act, 1869, says that the debts are to be proved in the prescribed manner, and there is no manner prescribed except that pointed out by the 67th and 68th rules, and under them the creditor or his agent must pledge his oath to the existence of the [221] debt. In the present case the creditor being dead, his legal personal representative is the creditor, and she or her agent is the only person authorized to prove the debt. The person appointed by the Court of Chancery is not the agent of the administratrix, and knows nothing whatever about the debt.

[SIR W. M. JAMES, L.J.: There are no negative words in the 67th and 68th rules. There are a multitude of cases to which those rules cannot apply. Whenever the Court of Chancery takes the administration of the creditor's estate out of his hands, it appoints a person to prove. In the same way the committee of a lunatic and a guardian *ad litem* of a person of unsound mind have power to prove.]

In the two cases cited under the present act the receiver of the estate appointed by the court was directed to prove the debt, which at all events would be more consistent with the practice of the court in analogous cases; but in neither of those instances was the point argued, and we contend that such appointment was not justified by the act. The present was a case which justified the Registrar in dealing strictly with the proof, for the bankrupt asserts that the greatest part of the debt has been paid off; and if the debt, as claimed, were admitted, it is so large that it would give Hare the complete command of the meeting.

(¹) 12 Ves., 127.

(²) 2 My. & K., 312.

(³) De G., 453.

(⁴) Law Rep., 12 Eq., 614.

(⁵) Ibid., 9 Ch., 626.

1875

Ex parte Warren. In re Joyce.

L.JJ.

Mr. *E. C. Willis*, for the bankrupt, followed the same line of argument.

SIR W. M. JAMES, L.J.: With regard to the ground on which the Registrar proceeded when he refused to admit the proof, it is necessary for us to express our opinion. The Registrar thought that the person appointed by the Court of Chancery was not the right person to prove for the debt or to vote on the appointment of a trustee, and that nobody but the administratrix was entitle to prove. It appears to me that the Registrar did not give sufficient weight to the established practice of the Court of Chancery. In this case, 222] the *administratrix, who was the legal creditor, has been deprived of her powers. The estate is the real creditor, and the Court of Chancery, which, for some reason, has undertaken the administration of the estate, has thought fit to appoint a person who is, in effect, the receiver of the court in respect of this particular thing. He is in the same position as if he had been appointed a receiver of an estate, or the guardian *ad litem* of a person of unsound mind, or the committee of a lunatic. I am therefore of opinion that the Registrar was not right in treating this as an insuperable objection to the *status* of the person who sought to prove. The Registrar did not think it necessary to make the appointment of a trustee stand over for investigation of the debt, though he probably would have done so if he had felt no difficulty as to the person proving. I think it will be better that it should stand over, and the matter must therefore go back to the Registrar to inquire as to the amount of the debt, and the proceedings will be suspended till the inquiry has been made. In this particular case there is so much *prima facie* doubt that the simple ordinary affidavit is not sufficient.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *W. F. Stokes*; Mr. *Parke*; Mr. *J. B. Pittman*.

[Law Reports, 10 Chancery Appeals, 222.]

L.JJ., Feb. 25, 1875.

Ex parte WARREN. *In re* JOYCE.

Liquidation by Arrangement—Receiver—Taking Possession of Debtor's Business—Undertaking as to Damages—Bankruptcy Rules, 1870, r. 260.

A petition for liquidation having been presented, a receiver was appointed and ordered to take possession of the fixtures and stock-in-trade at the debtor's brewery; and an injunction was granted restraining a mortgagee, who was in possession of the

brewery under a bill of sale, from intermeddling with the chattels in the brewery. When the injunction was granted the receiver and the debtor gave undertakings to be answerable for damages. The mortgagee afterwards established his title to the brewery and the chattels in it, and then applied for an inquiry as to damages sustained by the occupation of the receiver :

Held, that the receiver must be treated as the agent of the creditors, and *not [223 of the mortgagee, and could not charge the mortgagee with the expense of carrying on the business ; and that he was liable, under his undertaking, for damage for deterioration of the property, and for rent for use and occupation of the fixtures and stock-in-trade ; and an inquiry was directed accordingly.

THIS was an appeal from a decision of Mr. Registrar Spring Rice, sitting as Chief Judge in Bankruptcy.

By an indenture dated the 28th of August, 1872, James Smith Joyce mortgaged a leasehold brewery at Brixton, called the Brixton Brewery, and all the fixtures, fittings, machinery, utensils, carts, horses, articles, and effects which were or should be at any time during the continuance of the security in the brewery, or used in the business, to Joseph Loxdale Warren for £1,000. The mortgage contained a power of sale in the usual form. This indenture was not registered under the Bills of Sale Act.

On the 19th of February, 1874, Warren took possession of the brewery and the other property comprised in the security.

On the 20th of February the debtor filed his petition for liquidation, and on the same day T. M. Purday was appointed receiver and manager of the debtor's property and business. On the 21st an order was made, under rule 260 of the Bankruptcy Rules, 1870, on the application of the receiver, restraining Warren from seizing, removing, or intermeddling with any of the debtor's assets then in or on the debtor's premises at Brixton. On the occasion of this order being made, the receiver, and also the debtor, gave an undertaking to abide by any order the court might think fit to make as to damages in case the court should be of opinion that the said J. L. Warren should have sustained any damages which the receiver or the debtor ought to pay.

A motion was afterwards served on Warren to continue the injunction, which motion was adjourned for various reasons from time to time, the last adjournment being made on the 23d of May, and on each adjournment the receiver and the debtor renewed their undertaking to abide by any order as to damages.

The receiver, on his appointment, entered into possession of the brewery plant and other chattels used in the business, and carried on the business there until the 25th of April, when he discontinued the business and closed the house, finding, as he alleged, that the *business was being [224

carried on at a loss. This was done without any communication with Warren.

On the 21st of May, 1874, resolutions were passed for a liquidation by arrangement, and the receiver, T. M. Purday, was appointed trustee.

On the 4th of July an order was made by the court declaring that the goods, chattels, and fixtures in the brewery were the property of Warren, and not of the trustee, and ordering that possession of the brewery and the goods, chattels, and fixtures which at the time of the filing of the petition were on the premises should be delivered to Warren, and that Warren should have his costs of the application. This order was affirmed by the Court of Appeal on the 24th of July, and possession was delivered to Warren on the 8th of August. The taxed costs due to Warren amounted to £64 0s. 5d.

In the month of February, before the brewery was closed, a Mr. Allen offered to purchase the lease, with the fixtures and stock-in-trade, for £1,000, and this offer was continued so long as the brewery was kept open; but by reason of the receiver being in possession, Warren was unable to conclude the sale. After the brewery had been closed, Mr. Allen refused to give more than £500, in consequence of the deterioration of the plant and stock-in-trade.

Warren complained that, besides the deterioration of the plant and stock-in-trade, several of the chattels had been lost or made away with during the possession of the receiver; and also that only 380 casks out of 1,200 which were assigned to him by the mortgagee had been delivered up to him. It appeared, however, that a large number of the casks were, on the 19th of February, when Warren took possession, in the hands of customers, and they were claimed by the trustee as not having been in Warren's actual possession at the date of the liquidation.

In December, 1874, Warren applied to the court for an order that the receiver and trustee and the debtor might pay to him, in accordance with their undertakings, the damages sustained by him by reason of the order for an injunction, and for an inquiry as to the amount of such damages. In opposition to this application, Purday, as receiver and trustee, carried in an account for *articles purchased and other expenses in carrying on the business while he was in possession, showing a balance against Warren of £197. The Registrar disallowed many of the items in this account, but declared that Warren was liable to the amount of £75 4s., and he accordingly made no order on Warren's application,

except to declare that, after giving credit to Warren for £64 0s. 5d., the amount of his taxed costs, there still remained due from him to the receiver and trustee the sum of £11 3s. 7d. From this order Warren appealed.

When the appeal first came on it was ordered to stand over at the suggestion of the court, in order to serve the debtor with a notice of the appeal, which was accordingly done.

Mr. *De Gex*, Q.C., and Mr. *T. L. Wilkinson*, for the appellant: The Registrar has treated the receiver as if he was the officer of the court and the agent of both the creditors and the mortgagee; whereas he is only the agent of the creditors, and is acting hostilely to the mortgagee. On obtaining an injunction and turning the mortgagee out of possession, he must give an unqualified undertaking as to damages: *Ex parte Anderson* ⁽¹⁾; and the mortgagee is entitled to be recompensed not only for the deterioration of the chattels, but the loss of profits while out of occupation: *De Mattos v. Gibson* ⁽²⁾. Several of the chattels included in the bill of sale are missing, among others a large number of casks, and all of them are deteriorated by the stoppage of the business. We are also entitled to be indemnified against the ground rent and taxes of the house while the receiver was in possession; and also for the loss of the opportunity of selling the brewery and business for £1,000.

SIR G. MELLISH, L.J.: That is not such damage as a jury would be allowed to take into consideration in a trial at law. Besides, you might have applied to the court for permission to sell to the proposed purchaser notwithstanding the injunction.

Mr. *Roxburgh*, Q.C., for the trustee: All that the receiver did was done under the authority of the court. [226 He is, therefore, the agent of all parties, and the undertaking for damages must be taken to extend only to damage to the property arising from any act of his. With respect to the particulars of damage claimed by the appellant, some of them are quite indefensible. No rent or taxes are chargeable to the receiver, for he was only in possession of the fixtures and chattels. The injunction did not extend to the house, which still remained in the mortgagee's possession. Then, the difference in the number of the casks arises from the fact that a large number of them were in the hands of customers at the time of the filing of the petition, and the mortgagee never had possession of them, but they passed to the trustee in the liquidation.

⁽¹⁾ Law Rep., 5 Ch., 473.

⁽²⁾ 1 J. & H., 79.

1875

Ex parte Warren. In re Joyce.

L.JJ.

Mr. *Cabell*, for the debtor, asked to be discharged from his liability under the undertaking, and to have the costs of his appearance, which had been required by the court. One of the renewed undertakings had been given by the debtor on the 23d of May, 1874, after the appointment of the trustee, so that his liability under it would not be covered by his discharge in the liquidation.

SIR G. MELLISH, L.J.: All liability under any of the undertakings given before the appointment of the trustee would be provable in the liquidation. After his appointment, no undertaking ought to have been taken from the debtor.

SIR W. M. JAMES, L.J.: I think it must be referred back to the Registrar to ascertain the damage which has been sustained by the mortgagee by reason of the occupation of the receiver. The Registrar was not justified in taking the account of the receiver in the manner in which he did take it, treating him as the receiver on behalf of the mortgagee as well as of the mortgagor. He was in no sense the agent of the mortgagee, but he took possession of the mortgagee's property adversely to him, and carried on the business with it. With respect to the substance of the case, the mortgagee has a right to damages with respect to the chattels which he took under his mortgage security; but that only applies to those which he could take actual possession of; a very large [227] item, namely, a large number of casks which did not pass to him because they were outstanding in the possession of the customers, will have to be excluded. Therefore the inquiry will be as to the damage sustained by deterioration by reason of the interference of the receiver with the chattels of which the mortgagee had taken possession; and a fair rent must be fixed for the receiver's use and occupation of the chattels which were taken from the mortgagee without his consent, but there will be no rent for the house, nor any allowance for the ground rent or taxes, as the mortgagee was not restrained by the injunction from the use of the house.

With respect to the debtor, there will be no order against him; but no costs will be allowed him.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *Boydell*; Messrs. *Harper, Broad & Battcock*.

One who wrongfully converts the corn of another into whisky is liable for the value of the corn as thus increased. A wrongdoer is not entitled

to be allowed for an increase of the property in consequence of his wrongful acts: *Silsbury v. McCoon*, 3 N. Y., 379; *Richards v. Sanders*, 19 Barb.,

482-4; *Rice v. Hollenbeck*, 19 Barb., 664; *Hyde v. Cookson*, 21 Barb., 92; *Starr v. Winegar*, 3 Hun, 491, 6 N. Y., Supreme Ct. R., 33; *Baker v. Wheeler*, 8 Wend., 505; *Wilson v. Nasson*, 4 Bosw., 167; *Walther v. Wetmore*, 1 E. D. Smith, 9; *Crane v. Camp*, 22 New Jersey Eq., 614; *Ellis v. Wise*, 33 Ind., 127, 5 Am. Rep., 189; *Stearns v. Raymond*, 26 Wisc., 74; *Brakeley v. Tuttle*, 3 West Va. Rep., 86; 3 Parsons Cont. (6th ed.), 199; *Heard v. James*, 49 Mississippi, 236.

See *Johnson v. Ballou*, 25 Michigan, 460; *Wetherbee v. Green*, 23 Michigan, 311.

As to right in equity to pursue proceeds of property, see *Getty v. Campbell*, 2 Rob., 664; *Haddole v. Lundy*, 59 N. Y., 320; *U. S. v. Waterbrough*, Davies's Rep., 154, 160, S. C., 2 Ware, 158.

The property in the article remains in the original owner, and he may retake it from an innocent purchaser from the wrongdoer without regard to the increased value bestowed by him upon the article: *Silsbury v. McCoon*, 3 N. Y., 379; *Rockwell v. Sanders*, 19 Barb., 482-484, 2 Greenleaf's Ev., § 276.

In some states it is held the owner can only recover the original and not the increased value. In Wisconsin, *Single v. Schneider*, 30 Wisc., 570; in New Hampshire, *Foot v. Merrill*, 54 New Hampshire, 490, reviewing many authorities; in Massachusetts, *Bank v. Leavitt*, 17 Pick., 3.

Where the value be increased in good faith the owner can only recover the original value; as when coals of another are accidentally, and in good faith, mined: *Hilton v. Woods*, L. R., 4 Eq., 432.

If a chattel be converted by an innocent purchaser or holder into a thing of a different species, as where wheat is made into bread, olives into oil, or grapes into wine, the original owner cannot reclaim it, and can only recover the original value irrespective of increased value: *Silsbury v. McCoon*, 3 N. Y., 379; *Hyde v. Cookson*, 21 Barb., 92; *Wetherbee v. Green*, 23 Mich., 311, 3 Parsons on Cont. (6th ed.), 199.

See *Rockwell v. Sanders*, 19 Barb., 474.

[Law Reports, 10 Chancery Appeals, 250.]

L.JJ., Feb. 26, 27, 1875.

*MARSHALL V. SHREWSBURY.

[250

[1873 M. 11.]

Mortgage—Dismissal of Bill for Redemption—Equitable Mortgage by deposit of Deeds—Foreclosure—Consolidation of Mortgages.

The rule that the dismissal of the bill in a redemption suit operates as a foreclosure of the mortgage does not apply to an equitable mortgage by deposit of title-deeds.

A mortgagor filed a bill for the redemption of a legal mortgage. The mortgagee, by his answer, alleged that he had advanced another sum of money on the deposit of the title-deeds of another estate, and he claimed to hold both estates till both debts were paid. The plaintiff amended his bill by stating the allegations made by the defendant, but before the bill came to a hearing he obtained an order, *ex parte*, dismissing the bill with costs. The mortgagee afterwards contracted to sell both the estates, and then filed a bill for the administration of the estate of the mortgagor, who was dead, praying for permission to carry out the sale, and for payment of his whole debt out of the mortgagor's estate:

Held (affirming the decision of Hall, V.C.), that the equitable mortgage was not foreclosed, and that the plaintiff was entitled to the relief prayed for.

THIS was an appeal from a decision of Vice-Chancellor Hall.

In the years 1843 and 1844 the plaintiff, William Marshall,

and George Stevens, jointly advanced various sums amounting to £240 to Thomas Gillett on the security of three conditional surrenders of certain copyhold lands at Burnt-fen, in the Isle of Ely, containing 13A. 2R. 18P. George Stevens died in October, 1854; and, on the 11th of April, 1855, the plaintiff was admitted tenant of the land under these conditional surrenders.

251 *The plaintiff also advanced various other sums of money to T. Gillett, amounting, as he alleged, to £707, on the security of the deposit of the deeds and documents relating to a copyhold house at Littleport, called the Porched House, which the plaintiff had in his possession as Gillett's solicitor, Gillett promising to execute a legal mortgage when required; but no legal mortgage was ever executed of this property.

Gillett died on the 28th of September, 1851, having by his will given all his real and personal estate to W. Shrewsbury, upon trust to sell and convert the same into money, and after paying his debts, funeral and testamentary expenses, to hold the residue of the proceeds upon the trusts therein mentioned.

On the death of Gillett, Marshall entered into possession as mortgagee of the copyhold lands, and also of the Porched House, but gave them up again to W. Shrewsbury in 1858.

In July, 1870, W. Shrewsbury filed a bill against Marshall for the redemption of the copyhold lands at Burnt-fen. Marshall put in his answer, setting up the subsequent advances which he had made on the security of the deposit of deeds, and claiming to be paid the whole debt of £947 advanced on the two estates, with a large sum for interest.

W. Shrewsbury amended his bill, introducing a statement that "the defendant alleges that he advanced and paid to or for the use of the said T. Gillett several sums of money amounting to £707; and that previously to such advances, it was agreed between him and the said T. Gillett that such advances, with interest at £5 per cent., should be secured by the retainer by the defendant of all papers and documents of the said T. Gillett then in the defendant's possession relating to certain portions of the said T. Gillett's property at Littleport aforesaid." The bill, as amended, prayed for an account of what was due to the defendant for principal and interest under "his said security or securities," and for redemption in the usual form. Both parties went into evidence, and replication was filed, and the cause was set down for a hearing; but the plaintiff, being advised

that the property charged would not cover the principal and interest, obtained an order, *ex parte*, on the 30th of October, 1871, under which his bill was dismissed with costs.

*W. Shrewsbury died in December, 1871, having by [252 his will devised all his trust estates to his daughter, Mary Flanders, the wife of J. M. Flanders, who were defendants to the present suit.

On the 29th of February, 1872, the plaintiff Marshall agreed to sell the Burntfen lands and the Porched House to J. M. Flanders for £1,050. The contract recited the order of the 30th of October, 1871, and recited that the said order had the effect of a decree for foreclosure upon the merits; but, on the 18th of January, 1873, before the sale was completed, Marshall filed the present bill against J. M. Flanders and his wife, and the executors of W. Shrewsbury, claiming the sum of £947 and interest as a debt against the estate of Thomas Gillett, and praying that he might be at liberty to complete the sale of the property comprised in his mortgage securities, and that the rest of the testator's real estate (the personal estate being insufficient) might be sold for payment of the plaintiff and the other creditors of the testator.

The defendants put in their answer to the bill, in which they submitted that the dismissal of the bill in *Shrewsbury v. Marshall* by the plaintiff Shrewsbury operated as a decree for foreclosure of the said mortgaged premises; and that Marshall, by his contract for the sale of the property, had debarred himself from now recovering the alleged debt; they also relied upon the plaintiff's delay in filing the bill.

The Vice-Chancellor made a decree directing an account of what was due to the plaintiff in respect of his advances, except the sum of £240; and, after directing the usual inquiries as to the real estate of the testator, directed that the real estate should be sold and the proceeds paid into court to the credit of the cause.

From this decree the defendants appealed.

Mr. *Dickinson*, Q.C., and Mr. *Graham Hastings*, for the appellants: By Cons. Ord. xxiii. rule 13, the dismissal of the bill in the previous suit had the same effect as a dismissal at the hearing. It therefore amounted to a decree for foreclosure, and the debt is merged as to both estates: *Cholmley v. Countess of Oxford* (1); **Inman v. Wearing* (2); [253 and the plaintiff has admitted this by his contract to sell the estates. When a mortgagee puts the estate out of his power, so that he cannot restore it to the mortgagor, the re-

(1) 2 Atk., 267.

(2) 3 De G. & Sm., 729.

lation of mortgagor and mortgagee is finally closed. The foreclosure cannot, therefore, now be opened: *Walker v. Jones* (*); *Hansard v. Hardy* (*); *Lockhart v. Hardy* (*); *Palmer v. Hendrie* (*). There is no distinction in principle between the dismissal of the bill for redemption in the case of a legal and of an equitable mortgage. In both cases the plaintiff, by filing his bill, admits the existence of the debt and the charge on the estate, and by dismissing his bill he admits his inability to redeem the estate. It is true that the form of a decree for foreclosure in the case of an equitable mortgage is different from that in the case of a legal mortgage, because it is necessary for the equitable mortgagee to get a conveyance of the legal estate; but the distinction is only formal, and the effect is the same in both cases, namely, foreclosure of the estate and merger of the debt: *Parker v. Housefield* (*); *James v. James* (*). In the present case there is the additional circumstance that the mortgagee claimed to consolidate the two debts, and they were treated by both parties as one debt. It is contrary to all principle that the mortgagee should now claim to separate the debts again, and to say that the dismissal of the bill should operate as a foreclosure as to one security and not as to the other.

Mr. *Lindley*, Q.C., and Mr. *Cookson*, for the plaintiff, were not called on.

SIR W. M. JAMES, L.J.: I have really not been able to bring my mind to entertain any doubt of the correctness of the decree of the Vice-Chancellor. There is no doubt that it is an established rule of the court that if a mortgagor files his bill for the redemption of a legal mortgage, and it is dismissed for any reason except for want of prosecution, 254] *the dismissal operates as a decree for foreclosure against him. That rule is recognized by both text-books and authorities. The mortgagor, by filing the bill, admits the title of the mortgagee, and admits the mortgage debt, and the dismissal of the bill operates as a decree for foreclosure, because he cannot afterwards file another bill for the same purpose; he is not allowed thus to harass the mortgagee.

With regard to an equitable mortgage, I have never met with a bill by an equitable mortgagor for redemption, though such a bill might probably be filed. But how could the dismissal of such a bill operate as a decree for foreclosure?

(1) Law Rep., 1 P. C., 50, 61.

(2) 18 Ves., 455.

(3) 9 Beav., 349.

(4) 27 Beav., 349.

(5) 2 My. & K., 419.

(6) Law Rep., 16 Eq., 153.

The only thing foreclosed would be the right to redeem certain pieces of parchment. It may be that the plaintiff would be barred from bringing another bill to redeem those pieces of parchment, but that is all. When an equitable mortgagee files a bill to enforce his security, he does not get a simple decree for foreclosure, but he gets further substantial relief. He is entitled to have a declaration that his deposit operated as a mortgage, and that in default of payment of what may be found due, the mortgagor is a trustee of the legal estate for him; and then the decree goes on to order the mortgagor to convey the estate to him. Now, to say that because dismissal of a bill for redemption operates as a decree for foreclosure in the case of a legal mortgage, therefore the analogy would be good that the dismissal of a bill by an equitable mortgagor has the same effect, is to say that the dismissal of the bill is to be held equivalent to a declaration that the mortgagee has a lien for the amount claimed, and that the mortgagor is a trustee for him, and is bound to convey the estate to him. There is no authority for saying that a mere dismissal is an equivalent to such a comprehensive decree. In the present case the mortgagor files a bill for the redemption of a legal mortgage for an admitted debt of £240. The defendant puts in an answer in which he says, "I have another security on which I have advanced another sum of money." If he could prove that, he would be entitled to say that the mortgagee shall not redeem one estate without redeeming the other. The mortgagor does not file a bill saying, "I admit that you hold both securities, and I ask to redeem both together," but only says, "The defendant has one estate, and he claims to have another; and I am willing *to redeem estate A., and [255 also estate B. if he proves his mortgage upon it." Then the plaintiff changes his ground and dismisses his bill. In my opinion, that dismissal could not prevent him from setting up the defence on a subsequent occasion that there was really no such equitable mortgage, but the deeds were deposited for another purpose. The dismissal of the bill has left the right undetermined. It did not give the mortgagee the relief to which he was entitled in a foreclosure suit. Therefore it is impossible to attribute to it the same effect as a decree for foreclosure. If the mortgagee by his conduct had mixed up two mortgages, it may be that the mortgagor would have a right to say, "You must open the foreclosure altogether, and I will redeem the whole." But it is not so here. If there is any complication, it is because the mortgagor has dismissed his own bill. There is no authority or

1875

In re Green &c. In re Murton's Trusts.

L. JJ.

principle in favor of that which has been contended before us. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.: I am of the same opinion.

Solicitor for the appellants: Mr. *T. M. Wilkin*.

Solicitor for the plaintiff: Mr. *T. H. Bartlett*.

[Law Reports, 10 Chancery Appeals, 272.]

L.JJ., March 13, 1875.

272] **In re GREEN* (a Person of Unsound Mind not so found).

In re MURTON'S TRUSTS.

Trustee Act—Appointment of New Trustee—Trustee of Unsound Mind—Service.

Where a petition is presented for the appointment of a new trustee under the Trustee Act, 1850, in place of a trustee of unsound mind not so found, service on the trustee of unsound mind is not necessary.

UNDER an indenture of settlement, dated the 9th of February, 1836, certain leasehold estates and sums of stock in the public funds were vested in three trustees upon the trusts therein declared. The settlement contained a power to appoint new trustees in the place of any who should die or become unwilling or unable to act, which was vested in the trustee or trustees for the time being, or in the executors or administrators of any surviving trustee.

Two of the trustees died, and the surviving trustee became of unsound mind, but was not so found by inquisition.

Some of the persons beneficially entitled under the will now presented a petition under the Trustee Act, 1850, and in the matter of the person of unsound mind, praying that three new trustees might be appointed in the place of the two deceased trustees and of the person of unsound mind, and that an order might be made vesting the property in the new trustees. The other *cestuis que trust* were served with the petition, but not the trustee who was of unsound mind.

Mr. *Morshead*, for the petitioners, submitted that service on the trustee of unsound mind was not necessary. He referred to *In re East*⁽¹⁾, in which case, however, the court was only asked to make a vesting order, a new trustee having been previously appointed by the continuing trustees.

Mr. *Bunting* appeared for the respondents.

⁽¹⁾ Law Rep., 8 Ch., 735.

THE LORDS JUSTICES thought it was unnecessary to serve the person of unsound mind, and made the order asked for.

Solicitors: Messrs. *Sole, Turner & Knight*; Messrs. *Newbon & Co.*

[Law Reports, 10 Chancery Appeals, 273.]

L.JJ., March 22, 1875.

**In re MASON (a Person of Unsound Mind).* [273]

Appointment of New Trustees—Lunatic Devisee of a Trustee.

A testator devised real estate to trustees, their heirs and assigns, upon certain trusts. The surviving trustee devised all estates vested in him as a trustee to three persons, one of whom, after proving his testator's will, became of unsound mind. A petition was presented for the appointment of new trustees, and for the appointment of a person to convey on behalf of the devisees of the surviving trustee:

Held, that the petition was properly presented in lunacy as well as in chancery.

THIS was a petition presented in lunacy and chancery for the appointment of new trustees of the will of James Blyth.

The testator devised certain real estate to Godfrey and Lawson, to hold the same to them, their heirs and assigns, upon trust to pay one moiety of the rents to, or permit them to be received by, his daughter, Ellen Blyth, for life, and during coverture to her separate use without power of anticipation; and after her death he directed that one moiety of the estate should remain upon trust for her child or children who should attain twenty-one or marry, in equal shares, and his, her, or their heirs and assigns; and as to the other moiety, upon similar trusts for another daughter and her children. The power of appointing new trustees was given to the surviving or continuing trustee or trustees, or if none, then to the retiring trustee or trustees, or if none, then to the executors or administrators of the last deceased trustee. The testator bequeathed his personal estate to the same trustees upon trust for his widow for life, and then for a third daughter and her children.

Lawson, the surviving trustee, died in 1871, leaving a will by which he devised all trust estates to George Mason and two other persons, and appointed them his executors. This will was proved by all three executors.

George Mason had become of unsound mind, though not found so by inquisition, and the two other devisees refused to act in the trusts of Blyth's will. In these circumstances this petition was presented, praying for the appointment of two persons as new trustees of Blyth's will in the place of Godfrey and Lawson; for *the appointment of a per- [274

son to convey the real estate for all the estate vested in Lawson's devisees; and for a vesting order as to the personal estate subject to the trusts of the will.

Mr. *Bardswell*, for the petitioner.

Mr. *North*, for Lawson's devisees: It is submitted that this petition ought to be in chancery only. The cases appear to proceed on the principle, though none of them lay it down in express terms, that where there is jurisdiction independently of the fact of lunacy, that fact does not make the matter a lunacy matter: *Re Arrowsmith's Trusts*⁽¹⁾; *Herring v. Clark*⁽²⁾. The case of *In re Owen*⁽³⁾ is quite consistent with that principle, for it was a case where there was no jurisdiction apart from lunacy. Here there are no duly constituted trustees, and the Court of Chancery would have had authority under the Trustee Act, 1850, ss. 32, 34, to make the order asked if Mason had been of sound mind. The case is, therefore, similar to *Re Arrowsmith's Trusts*.

Mr. *Bardswell*, in reply: It is submitted that the order ought to be in lunacy as well as in chancery: *Re Stewart*⁽⁴⁾; Trustee Act, 1850, s. 3.

SIR W. M. JAMES, L.J.: Looking at sect. 3, I think the order ought to be in lunacy as well as in chancery.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *T. W. Payne*; Messrs. *Gregory, Rowcliffes & Rawle*.

⁽¹⁾ 6 W. R., 642.

⁽²⁾ Law Rep., 4 Ch., 782.

⁽³⁾ Law Rep., 4 Ch., 167.

⁽⁴⁾ 8 W. R., 297.

[Law Reports, 10 Chancery Appeals, 283.]

L.JJ., Feb. 17, 22, 1875.

283]

*AYNSLEY V. GLOVER⁽¹⁾.

[1874 A. 81.]

Ancient Lights—Enjoyment from Time immemorial—Enlargement of Windows—Injunction or Damages—Prescription Act (2 & 3 Will. 4, c. 71).

In a suit to restrain the defendant from building so as to obstruct the plaintiff's ancient lights, it was proved that for a period of more than twenty years, extending to within a very short time before the bill was filed, there had been unity of possession of the properties of the plaintiff and the defendant, but there was no evidence of there ever having been any unity of title; and it was proved that before the unity of possession commenced the access of light to the windows had been enjoyed as far back as living memory went:

Held (affirming the decision of the Master of the Rolls), that the plaintiff had established his title to the access of light, by proof of enjoyment from time immemorial, independently of the statute 2 & 3 Will. 4, c. 71; for that the statute does not take away any of the modes of claiming easements which existed before its passing:

⁽¹⁾ Affirming 11 Eng. R., 521.

Held, also, that the fact that some of the windows had been considerably enlarged did not take away the right to an injunction; and that the plaintiff ought not to be put upon the terms of restoring the windows to their former size.

THIS was an appeal by the defendant from a decree of the Master of the Rolls granting a perpetual injunction against interference with ancient lights in a building forming part of an inn. The case is reported on an application for an interlocutory injunction (*).

The bill was filed to prevent building on a vacant piece of the ground so as to obstruct the light coming to any of the eight windows, which the plaintiff alleged to be ancient lights. The plaintiff obtained a decree as to four of them, with costs of suit.

As to these four windows, it was deposed to by an old man, above eighty years old, that he remembered them all his life, but that two of them had been considerably enlarged about the year 1846. From the year 1849, or earlier, till shortly before the commencement of the suit, the property on which the windows were, and the vacant piece of ground, were in the occupation of the same person; but there had not been any unity of title.

*Mr. *Roxburgh*, Q.C., and Mr. *Cracknall*, for the [284 defendant, in support of the appeal: The plaintiff's title must depend on the act 2 & 3 Will. 4, c. 71, s. 3, and is defeated by the unity of possession: *Onley v. Gardiner* (*); *Battishill v. Reed* (*). There is no authority showing that a right to light can be claimed otherwise than under the statute.

[THE LORD JUSTICE MELLISH: It is every-day practice to plead, 1, enjoyment for twenty years before action; 2, enjoyment for forty years before action; 3, enjoyment from time immemorial; 4, a lost grant; and it has always been understood that a right may be supported on the third ground, although it may be incapable of being supported under the first or second. There are no negative words in the statute to take away rights existing independently of it.]

At all events, there is no right in respect of the new part of the windows, and the case should be dealt with as in *Staight v. Burn* (*).

[THE LORD JUSTICE JAMES: I do not believe that that case has ever been understood as intended to lay down the rule that a plaintiff must restore his windows to their former size in order to get an injunction. I understand it only to

(*) Law Rep., 18 Eq.; 544, 11 Eng. R., 521.

(*) 18 C. B., 696.

(*) Law Rep., 5 Ch., 163.

(*) 4 M. & W., 496.

have meant that a plaintiff must not, pending the proceedings, obstruct his own light in such a way as to make it impossible at the hearing to try the question of fact properly.]

To hold that the plaintiff can only get an injunction by restoring the windows to their old state is reasonable, as otherwise the owner of them would acquire an increased easement.

[THE LORD JUSTICE JAMES: The servitude would not be increased.]

The case is not one for an injunction, but for damages. It was the object of Lord Cairn's Act to give the court a discretion as to which it would grant: *Jackson v. Duke of 285 Newcastle* ⁽¹⁾. At all *events the plaintiff should not have the costs of the suit, for he has only succeeded in part: *Weatherley v. Ross* ⁽²⁾.

Mr. *Southgate*, Q.C., and Mr. *Keary*, for the plaintiff, were not called upon.

SIR G. MELLISH, L.J.: This is an appeal from a decree of the Master of the Rolls in a suit for the interruption of ancient lights.

The suit appears to have been brought originally by a bill for the interruption of eight ancient lights; but the plaintiff has only succeeded in getting a decree as to four of them.

The first question is, whether the plaintiff has made out his right to the light in respect of those four windows. The objection that is made to them is, that although they have been erected more than twenty years, yet there has been a unity of possession, at any rate, from the year 1849, if not before, up to within a very short time before the filing of the bill.

In my opinion, it is unnecessary to consider whether the plaintiff could have made out his right under the statute 2 & 3 Will. 4, c. 71, because I am of opinion that, under the circumstances of the case, the plaintiff has clearly made out a right from time immemorial.

The statute 2 & 3 Will. 4, c. 71, has not, as I apprehend, taken away any of the modes of claiming easements which existed before that statute. Indeed, as the statute requires the twenty years or forty years (as the case may be), the enjoyment during which confers a right, to be the twenty years or forty years next immediately before some suit or action is brought with respect to the easement, there would be a variety of valuable easements which would be altogether destroyed if a plaintiff was not entitled to resort to the proof which he could have resorted to before the act passed.

⁽¹⁾ 3 D. J. & S., 275.

⁽²⁾ 1 H. & M., 349.

Now, in this case there is an old man above eighty years old, who says that he recollects these windows all his life; that before the cottages, in which the windows in question are, became part of the inn to which they now belong, they were occupied as separate *cottages; that he was born [286 in one of them; and that the windows were there as far back as he knew the cottages, subject to this, that two of the windows had been considerably enlarged in the year 1846. It also appears that the cottages were in existence in the year 1808, for in a deed dated in that year they are conveyed as being then in existence. I quite agree with the Master of the Rolls that it must, of course, be inferred that the windows were in existence then. Beyond that we know nothing about them, and therefore the proof is that the cottages with the lights in them have existed as far as living memory goes, and we have no evidence as to when they were built; and although there is clear evidence of unity of possession in the year 1849, and there is a question whether that unity of possession may not have commenced between the years 1830 and 1840, still it is clear that there were a great number of years before during which there was no unity of possession, and there is no evidence that there ever was any unity of title at all. Under those circumstances there is, I apprehend, clear evidence of a right to the light from time immemorial, which is not in any way taken away by the statute. I am, therefore, of opinion that the plaintiff has proved his right to these four lights.

Then the next question is, whether he is bound to reduce the two lights out of the four which were enlarged by the roof being raised and the windows being raised with it—whether he is obliged to bring back those old windows to their old size as a condition of obtaining the injunction. I am of opinion that he is not. That appears to me clearly to follow from the case of *Tapling v. Jones* (*), which I think governs courts of equity as well as courts of law.

The principle of that case is perfectly plain, that opening a new window or the enlargement of an old window in the wall of your house is no injury or wrong at all to your neighbor. It is one of the natural rights of property which any man is entitled to exercise, and he cannot, by exercising that right, lose any other right which he may have acquired. Therefore, having got a right to the entry of light into a window of a certain size, he does not, by making that window larger, lose his right to the entry of the light to the old part of it. I do not understand upon what *prin- [287

(*) 11 H. L. C., 290.

1875

Aynsley v. Glover.

L.JJ.

ciple this court can say, "We will not give you relief in equity against being wrongfully deprived of the light to which you are entitled unless you do something which you are not bound to do, viz., block up windows which you are perfectly entitled to open if you please." To impose such a condition appears to me to be inconsistent with the principle of *Tapling v. Jones* (¹), and I do not think that there is any authority in favor of it. The only case cited was *Staight v. Burn* (²), which appears, I think, to have depended upon its own circumstances; at any rate, it is a case on an interlocutory injunction, which cannot bind this court in determining what is the final decree to be made. I am of opinion, therefore, that the plaintiff cannot be put under terms to reduce his windows to their old size.

The next point that was raised is that the court ought not to grant an injunction, but ought merely to give damages. Now I am of opinion that this is a case for an injunction. I think that the plaintiff has proved his right to the ancient windows. Here are rooms in an inn which is used and enjoyed for the purposes of an inn, and the defendant proposes to erect a building within five feet of them. Of course that would altogether obstruct the light coming to them. He proposes to build on a waste piece of ground, and the plaintiff has filed his bill before the building is even commenced. It is fortunate in this case that the building proposed to be erected is so near his house that the plaintiff is not in the difficulty in which plaintiffs often are, viz., as to its being doubtful whether the proposed building would obstruct the lights or not. Here it is so near that it is absolutely certain that it would obstruct the lights, and therefore very properly, the plaintiff filed his bill immediately. I cannot understand why the defendant is to be allowed to build upon a mere bit of waste land so as to block up the rooms of this public-house which are necessary for its enjoyment. It appears to me that this is properly a case for the court to interfere by injunction.

The only other point which was raised was about costs. I do not see any reason to object to the decision of the Master of the Rolls about the costs, because practically the case as to the whole of the eight windows depended upon the 288] same evidence, and in *my opinion the costs would not have been materially lessened if the bill had been filed respecting these four windows only. I do not think that there is any reason to suppose that the defendant would have yielded respecting the four windows, because he has

(¹) 11 H. L. C., 290.

(²) Law Rep., 5 Ch., 163.

fought it all out respecting the four windows as well as the others. If he had made an offer to submit as to the four windows the case would have been different.

I am of opinion that the decision of the Master of the Rolls is right, and that this appeal should be dismissed with costs.

SIR W. M. JAMES, L.J.: I am of the same opinion.

Solicitors: Messrs. *Wedlake & Letts*; Mr. *F. C. Greenfield*.

[Law Reports, 10 Chancery Appeals, 291.]

L.JJ. March 22, 1875.

*DE BAY V. GRIFFIN.

[291]

[1870 D. 133.]

Costs—Solicitor's Lien on Fund—23 & 24 Vict. c. 127, s. 28—Taxation.

B. acted as attorney for G. in an action which resulted in G.'s recovering a large sum. A bill was filed by persons claiming through G. to establish their equitable title to that sum, and in February, 1871, the defendant in the action paid the sum recovered into court to the credit of the cause in which B. was a defendant in respect of his lien. In March, 1871, B. delivered his bill of costs in the action to G. In December, 1873, the suit was compromised and the fund distributed, except a sum kept in court to answer B.'s claims:

Held (reversing the decision of Malins, V.C.), that B. was not entitled to have his bill of costs paid out of the fund without taxation, however the case might have stood, if his bill had been delivered at such a time that G.'s right to tax it would have been lost before the fund was paid into court.

THIS was a motion by the defendants Fothergill, Lewis and Hankey, by way of appeal from an order of Vice-Chancellor Malins on an adjourned summons.

In 1866 the defendant Griffin entered into a contract with the Tharsis Sulphur and Copper Company, Limited, for the construction of a railway in Spain.

After the completion of the railway disputes arose between Griffin and the company as to the amount payable to him, and he commenced an action at law against the company for the balance he claimed. The matter was referred to arbitration. James Brendon Batten, the respondent in the present appeal, acted as attorney for Griffin in the action and arbitration. In November, 1870, the arbitrator awarded to Griffin £26,457. In December, 1870, the plaintiffs in this cause filed their bill against Griffin, the company, and Fothergill, Lewis and Hankey, who claimed an interest as incumbrancers from Griffin under an instrument dated the 28th of April, 1869, and some other incumbrancers, to es-

tablish the title of the plaintiffs to the £26,457 under arrangements entered into between them and Griffin at the time of his entering into the contract to make the railway. Batten was made a defendant as claiming a lien on the fund 292] for his costs, and on *the 8th of February, 1871, an order was made for the company to pay £3,000 into court to a special account—£971, the expenses of the award, to the person who had paid them, and £22,709 into court to the general credit of the cause. The payments into court were made on the same day.

On the 11th of March, 1871, Batten delivered to Griffin his bill of costs in the action and arbitration, amounting to £3,041 7s. 10d., against which he set off £1,715 19s. taxed costs received from the company, and £500 received from Griffin, leaving a balance of £825 8s. 10d. In May, 1871, he put in his answer in the suit, claiming a lien on the fund in court for that sum under 23 & 24 Vict. c. 127, s. 28, and on the 21st of January, 1873, he obtained a charging order from the Court of Exchequer under that act.

In the latter part of 1873 an agreement was come to for compromising the suit. Such compromise was carried into effect by an order of the 4th of December, 1873, which contained a direction that a sum of £1,500 consols should be carried over to a separate account, "The account of defendants Fothergill, Lewis and Hankey, subject to defendant Batten's claim and his costs."

In April, 1874, Batten applied by summons to have his costs of the suit taxed, and the amount of such taxed costs and the £825 8s. 10d. raised and paid out of the £1,500 consols. This summons was adjourned into court, and Vice-Chancellor Malins being of opinion (') that the right to have the costs of the action and arbitration taxed had been lost, made an order as asked.

(') 1871. Jan. 23.

SIR R. MALINS, V. C.: It is perfectly clear that the money paid into court on the 8th of February, 1871, was paid in subject to the lien of Mr. Batten as the attorney of Mr. Griffin. Griffin had given a security to Messrs. Fothergill, Lewis and Hankey, upon what he should recover in the litigation with the Tharsis Company, and as between them and Mr. Griffin they were entitled to the whole of what Mr. Griffin was entitled to recover. They state in their affidavit that on the 3d of May, 1869, they gave a notice to the Tharsis Company of their claim against Mr. Griffin, but

they did not give notice to Mr. Batten, who was conducting the litigation, that they claimed to deprive him of one iota of right which he might have against Mr. Griffin; indeed, they do not allege that they gave any notice to Mr. Batten. The money, then, on the 8th of February, 1871, was paid into court, subject to the lien of Mr. Batten. Now, as between Mr. Batten and all parties concerned, what was his lien? Clearly his lien was for his costs to be taxed as between solicitor and client. Mr. Batten therefore, having this right on the fund brought into court, delivered his bill of costs on the 11th of

**Mr. Marten, Q.C., and Mr. W. F. Robinson, for [293 the appellant: The respondent has obtained a charging order, and now wishes to go behind it and escape taxation. There*

March. What was the right of Mr. Griffin on the signed bill of costs? His right was to have that bill of costs taxed; and he might immediately, or at any time within a year, as a matter of course, have referred it for taxation. Mr. Griffin, who was the person at that time to pay the bill—who was the only client—took no steps to tax, but from the 11th of March, 1871, no objection whatever was raised to this bill. Mr. Batten delivered the bill, Mr. Griffin received it, and has had it in his possession for three years without raising any objection; and if Mr. Griffin were the only person before me now, upon the ground of acquiescence, the bill having been delivered for three years, it cannot be taxed as of course, but only upon some special circumstances shown. I think that the court is and ought to be slow in taxing a solicitor's bill where the client has had it in his possession without objecting to it for three years. If Mr. Griffin was the only person interested, I should unhesitatingly say that he has no right now to have his bill taxed, unless he shows very special circumstances for doing so. But it has been said this morning, and an affidavit of the managing common law clerk of Messrs. Thomas & Hollams has been read in support of the allegation, that the bill contains improper and enormous charges. Certainly on reading that affidavit the charges there specified seem large, but I find that many of them were for things done by the express order of Mr. Griffin himself, and of such items, however lavish the expense might be, Mr. Griffin (whom I must treat as an intelligent man, and intimately conversant with the business he was conducting, which was that of a railway contractor claiming against the company for whom he made the railway), if he choose to have that expense incurred, could not complain; and after all I have heard, I cannot accede to the notion that Messrs. Fothergill, Lewis and Hankey have any greater right against Mr. Batten than Mr. Griffin himself had. I am therefore of opinion that if Mr. Griffin were now the applicant to have the bill taxed, there are

no special circumstances sufficient to induce me to deviate from the ordinary course, which is to treat a solicitor's bill delivered more than a year as conclusive as to the amount, and to prevent the client having it taxed. I acted upon the same principle in the recent case of *Brooks v. Sidebottom*, and held that after the client has had the bill in his possession, and has had every opportunity of objecting to the amount, it is not reasonable that he should be permitted to tax it after such a lapse of time as would justify the solicitor in believing that all questions between himself and his client as to amount were settled. I am therefore of opinion, upon these grounds, that upon an application by Mr. Griffin himself I should consider him bound by the amount stated in the bill signed and delivered.

Now in this case it would be a grievous hardship upon Mr. Batten if Messrs. Fothergill, Lewis and Hankey were held to have a better right than Mr. Griffin himself. Mr. Griffin undoubtedly did tell Mr. Batten that Messrs. Fothergill, Lewis and Hankey had claims against him, and would be entitled to some of the money or all the money he recovered in the action. But what does he recover? Only that portion of the damage to which he is entitled after paying his attorney's bill; and therefore if Messrs. Fothergill, Lewis and Hankey intended to prevent the unnecessary incurring of costs in this case, knowing the nature of the claim, they ought, instead of leaving Mr. Griffin to conduct it in his own way, and therefore in fact permitting him to act as their agent to conduct the litigation, and to say what copies should be made, what counsel should be engaged, and how the litigation should be conducted, to have intervened and said, "We are to have the fruits of this litigation; we cannot have it conducted in an unnecessarily expensive manner. Mr. Griffin has no interest in it, and therefore we must have it conducted economically, so that whatever is recovered may go to pay us." As they permitted him to act without control, my opinion is that they are bound by

294] is a broad distinction *between a common law lien and a lien under the statute. The one is only on the interest of the client, the other is on the fund preserved, irrespective

his conduct, and can have no greater right than Griffin himself would have had.

Mr. Pearson has referred to the act 6 & 7 Vict. c. 73, s. 38, which provides that where any person, not the party chargeable with the bill, shall be liable to pay or shall have paid such bill, either to the attorney or solicitor or to the party chargeable, it shall be lawful for such person, his executors, administrators, or assigns, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make; and then contains this proviso: "Provided always, that in case such application is made when under the provisions herein contained a reference is not authorized to be made except under special circumstances, it shall be lawful for the court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application." If, therefore, Messrs. Fothergill, Lewis and Hankey could have shown that any special considerations existed in their favor which did not exist in favor of Mr. Griffin, then I should have had regard to them; but in my opinion there is not a tittle of evidence to show that they are entitled to any greater favor than Mr. Griffin would have been. They have bound themselves as to the mode of conducting the litigation entirely by what Mr. Griffin did. This is the conclusion I should have arrived at if there had been no charging order.

Then it is urged that Mr. Batten has obtained a charging order. Now, first, does a solicitor by obtaining a charging order abandon the lien which he had before it was made? There has been cited to me what Lord Eldon said in *Bat. v. Symes* (T. & R., 87), that by taking security the solicitor abandons his lien. No doubt Lord Eldon said what is perfectly correct, as mostly what he said was correct, but what

does he mean by taking a security? He does not mean if a man has a lien upon a fund, and he takes a written order also that he shall have that lien, that he abandons the lien. It cannot be so, because he has the same thing as he had before. What, then, is the effect of taking this charging order? It was clearly unnecessary to obtain it, and I do not think it was a wise thing to obtain it, but I cannot say that the charging order prejudices any right which Mr. Batten previously had. The charging order therefore must, in my opinion, as Mr. Pearson in his reply contended, be regarded only as an additional security, if additional security were wanted, which for the reasons I have stated it was not.

But then it has been argued that I must treat this case as if it depended upon the charging order only. As that point has been so strenuously argued, and has occupied so much of the time of the court, I think it right to give my opinion upon that subject. If it rested merely upon that, I am bound to say that I should be obliged to come to a conclusion in favor of Messrs. Fothergill, Lewis and Hankey, because I think by the terms of the 28th section the charging order can only be for taxed costs; and if, therefore, the right of the solicitor depended solely upon the charging order, I must take the right as it is conferred, that is, as a right to have taxed costs only. But if the solicitor has a lien upon the fund, as in the present case, which gives him abundant security without a charging order, he does not want to have this, which gives him taxed costs only, because he has that already which gives him the amount of the costs which the parties have taxed for themselves. A man is not obliged to tax a bill. Taxing a bill means ascertaining through the Taxing Master what is justly due upon it. The client may be his own taxing master, and say, "I think your bill is reasonable. You have delivered a bill for £500 for a litigation of a troublesome character. I admit it is a proper bill, and I quite admit that that is the amount I should pay." That is taxing it for himself. But "taxed costs" means taxed by the

of the interest of the client: *Verity v. *Wylde*(¹); [295 *Bailey v. Birchall*(²). The lien can only be such as is given by the statute, i.e., for taxed costs.

Mr. *J. Pearson*, Q.C., and Mr. *Millar*, for Batten: There cannot be any taxation of a bill after a year, except under special circumstances, and no special circumstances of any description are alleged here. The incumbrancers stand in no better position than Griffin himself.

*SIR W. M. JAMES, L.J.: I am of opinion that the [296 order of the Vice-Chancellor must be discharged. The case has nothing to do with the Solicitors Act (6 & 7 Vict. c. 73), it is the case of an application to deal with a fund in court, and the court must ascertain what the parties are entitled to. At the time when the fund was brought into court no bill had been delivered; there was therefore no claim for any ascertained amount of costs. The attorney said, "I have a claim on the fund for my costs," i.e., for taxed costs, and that being his right that right was preserved. His right at that time was to taxed costs, and that is the right which the court has to give him; the *quantum* is to be ascertained in the ordinary way. The case is similar to other cases of paying costs out of a fund. Nothing which was done by the legal holder of the fund after the lien was created could alter the rights of the real owners. The order of the Vice-Chancellor must be discharged, and an order for taxation made, but not under the Solicitors Act. The costs will be taxed as between solicitor and client, and the costs of the taxation will not depend on the result, but the solicitor will have them in any event.

SIR G. MELLISH, L.J.: If the bill had been delivered, and a twelvemonth had elapsed before the fund was paid into court, the case might have stood otherwise; but here there was no right to costs free from taxation when the fund was paid in, and the right then existing cannot be altered.

Solicitors: Mr. *J. B. Batten*; Messrs. *Hollams, Son & Coward*.

Taxing Master; therefore if Mr. Batten's right depended solely upon the charging order, I should have come to the conclusion that, inasmuch as it would in that case have been a new right given to him by the act of Parliament, he could only have taken that which the act gives him, namely, the

amount of his taxed costs. But for the reasons I have stated I am of opinion that his right does not depend upon the charging order; but upon his general lien upon the fund which has been paid into court.

(¹) 4 Drew., 427.

(²) 2 H. & M., 371.

[Law Reports, 10 Chancery Appeals, 297.]

L.JJ., March 23, 1875.

297] *FISHER & COMPANY V. APOLLINARIS COMPANY.

[1875 F. 13.]

Repeated Publication—Libel—Compromise of Criminal Proceedings—Duress.

The prosecutors in a trade-mark case offered no evidence against the offender, and he was acquitted, he giving a letter of apology, with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months:

Held, that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter.

Where an offence is of such a nature that the offender may be proceeded against either civilly or criminally, there is nothing illegal or improper in a compromise of the criminal proceedings taken against him.

Order of Malins, V.C., reversed.

THE bill in this case was filed by a company called Fisher & Company, Limited, and by Eugene Fisher, as plaintiffs, against a company called the Apollinaris Company, Limited, and stated that Fisher had for some time carried on the business of mineral water manufacturer. That a company called Fisher & Company, Limited, was duly registered for the purpose of acquiring and carrying on the business aforesaid; and by an agreement, dated the 9th of October, 1874, and made between Fisher of the one part, and E. J. Drew, on behalf of Fisher & Co., of the other part, Fisher agreed to sell to the company, when incorporated, his stock and goodwill in the business. That in October, 1874, the Apollinaris Company instituted a prosecution against Fisher for having unlawfully inclosed mineral water in certain bottles having thereon the trade-mark of the Apollinaris Company. That the police magistrate committed Fisher for trial, he being allowed to enter into his own recognizances to appear. That at the trial no evidence was offered against Fisher, and a verdict of not guilty was returned; and in pursuance of an agreement in that behalf, but under duress of the said criminal proceedings, Fisher signed and gave to the defendants a letter in writing as follows:

“Apology.—To the Apollinaris Company, Limited.

“Gentlemen,—You having instituted a prosecution for
298] misdemeanor *against me for having sold as Apollinaris water, water which was artificially manufactured in this country in imitation of that which you import from the

Apollinaris Brunnen, Neuenahr, Ahrweiler, and of which you have the exclusive agency, and having been committed to take my trial for that offence, I hereby beg to assure you that I sold the water in question without any knowledge that the same had been improperly manufactured. I, however, desire to express to you my deep sorrow that I should under such circumstances have been induced to sell or dispose of such aerated water, and I hereby offer the fullest apology to you in my power, and trust that you will not further continue proceedings against me.

"I authorize you to make such use of this apology as you may think necessary.

"Dated this 14th day of December, 1874.

"Eugene Fisher."

That the Apollinaris Company, on or about the 16th of December, commenced, and had ever since continued, to publish or insert in the London daily and other papers the above-stated written apology. That the effect of the extensive and continuous publication of this advertisement had been most prejudicial both to Fisher and to Fisher & Co., by deterring the public from taking shares in that company, and thus preventing the company from being in a position to carry out their agreement with Fisher, and also by injuring the trade and business which Fisher & Co. had agreed to purchase from Fisher; and that such continued advertisement would have the effect of destroying the business of Fisher, which the company had been formed to purchase. That much correspondence had passed between the solicitors on both sides. And the bill set out the correspondence, beginning with a complaint by Fisher's solicitors on the 19th of January, 1875, and containing an account given by them of the circumstances under which Fisher had bought the mineral water and bottles in question. And the bill charged that the advertisement was inserted with the fraudulent intent to destroy the business which Fisher & Co. had agreed to purchase; that the agreement, having been entered into under duress, was null and void, and that the authority given was revokable, and was revoked by Fisher, *and [299 that in the advertisement the nature of the charge against Fisher was incorrectly set forth. And the bill prayed that the defendants might be restrained from publishing the advertisement, and might pay damages to Fisher & Co., and also to Fisher. The bill was filed on the 5th of February, 1875.

To this bill the Apollinaris Company demurred generally.

The Vice-Chancellor, Malins, overruled the demurrer (').
The defendants appealed.

(1) 1875. Feb. 25.

SIR R. MALINS, V.C.: [His honor read the allegations in the bill, and the correspondence, and observed that no doubt the intention was that the apology should be advertised, but it must have been implied from the nature of the transaction that a reasonable use should be made of such a document, and that it was not to be made a means of persecuting Fisher and holding him up to contempt every day of his life; and that, according to the statements made in the letters of Fisher's solicitors, his offence was very slight. His honor then continued:]

There is an allegation that the continuing to publish these advertisements will be ruinous to the plaintiffs' business; and that is admitted to be true. Does justice require that these advertisements should be allowed to continue as long as this company exists and Fisher lives? Are they to be at liberty to parade him before the public every day of his life, as having committed an offence of this very small character, for which they have elected to prosecute him criminally? I quite agree that they were at liberty several times to advertise the apology in order to inform the public that Apollinaris water of a spurious character had been sold, and thus to obtain some protection in their trade. But are they at liberty to repeat this every day of this man's life, and to parade this in the public papers, and make his life a burden to him? I think that this power which he gave them to advertise ought to be exercised in a reasonable and proper manner. A reasonable and proper manner would be to issue four or five advertisements at the interval of a week if they thought fit; but to continue, as I am satisfied they intend to continue, this as long as this man lives, to insult him every day by reminding the public that he has been prosecuted criminally, is, in my opinion, a most unreasonable and improper use of the apology, and one which, I think, this court would be fully justified and called upon to prevent.

Now, with regard to the principles of law applicable to the case, I do not think there is much difficulty, because

I take it on the broad ground that supposing this man had gone to trial and had been convicted of this offence (which I do not believe possible, if there is any truth in his statement)—but if he had been convicted of a misdemeanor, would they have been justified in inserting an advertisement every day of the man's life stating to the public that he had been on a certain day so convicted? A man expiates his offence by undergoing the sentence which the tribunals of his country impose upon him, and when he has completed the sentence, whatever it may be, whether the payment of a fine or imprisonment, nothing, in my opinion, can be more improper than that he should have it thrown in his face every day that he had been so convicted; and nothing can be more improper than that those who accept an apology should think it justifiable to use it for such a purpose. I am very much inclined to think that upon the law of the subject the decision in the case of *Williams v. Bayley* (Law Rep., 1 H. L., 200) is applicable to this case. [His honor then stated the facts of that case.] Now the observations there made doubtless referred to the particular case then before the House of Lords, viz., compounding a felony. That was a felony, this was a misdemeanor. They have thought fit to compound a misdemeanor, and I am by no means satisfied that there is any justification for the course they have pursued. If they choose to compound a misdemeanor, I am inclined to think that the argument is very well founded, that they are not at liberty to avail themselves of the compounding of a misdemeanor to turn it to their profit, and certainly not to turn it to the destruction of the man from whom they have obtained such an apology. It is clear that Lord Westbury in that case did not intend to limit his observations to compounding a felony, because he says (p. 220): "Now, such being the nature of the transaction, my Lords, I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you

*Mr. Glasse, Q.C., and Mr. Davey, for the appellants: This is either a libel or it is not, and in neither case can this court interfere: *Prudential Assurance Company v. Knott* (*). The plaintiff, Fisher, gave us authority to publish this, and how can *he complain of us for doing so? If we were to be restricted, he should have made that part of the agreement. However, as a matter of fact, we have now discontinued the publication. [300] [301]

Mr. John Cutler (Mr. Higgins, Q.C., with him) for the plaintiffs: If this is a libel, it is not certain that the court will not interfere: *Dixon v. Holden* (*). Moreover, if this apology was given under duress, the agreement as to publication is void. It is contrary to law to convert a crime into a profit: *Williams v. Bayley* (*). No doubt the crime there was a felony; but the same rule applies to a misdemeanor, and it is doubtful whether compounding a misdemeanor is lawful: *Steph. Com.* (*) Here they have traded on their knowledge of a crime having been committed, and are using that knowledge to crush a rival.

SIR W. M. JAMES, L.J.: I am of opinion that the order of the Vice-Chancellor in this case must be discharged and the demurrer allowed.

The case is very simple. Fisher was found selling water, which was not Apollinaris water, in bottles bearing the mark of the Apollinaris Company. They did not sue him, as they might have done, either at law or in this court, but they proceeded against him before a magistrate under the Trade

shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now that is the principle of the law, and the policy of the law; and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privy to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed." A misdemeanor is also a crime, and proceeding on the ground that this apology having been accepted, the defendants were bound to use it in a proper and reasonable, and not in an oppressive,

manner, and not so as to destroy the commercial character of Fisher, and render it impossible, as he has alleged, for him to carry on his trade with any advantage. I think also that, inasmuch as they thought fit, instead of taking him to trial, to compound with him, they cannot turn that compounding to their own advantage. I also think that their proceedings were improper upon this ground—that they knew very well that the offence was so purely accidental and so trivial that if they had gone to trial the man would unquestionably, in my opinion, have been acquitted.

On every ground, therefore, the demurrer must be overruled.

(1) Law Rep., 10 Ch., 142.

(2) Law Rep., 7 Eq., 488.

(3) Law Rep., 1 H. L., 200.

(4) 6th ed., vol. iv., p. 321.

Marks Act (25 & 26 Vict. c. 88). The question to be decided was, whether he was selling with a guilty knowledge that the water he was selling was not genuine. There was evidence on both sides, and the magistrate came to the conclusion that there was a case to go to a jury, and committed Fisher for trial, taking his own recognizances for his appearance. At the trial no evidence was given, and a verdict of not guilty was entered. It is not alleged when the agreement was made, but in pursuance of an agreement with the defendants, Fisher signed and gave to them a written apology, which was no doubt part of the arrangement under which the prosecution was abandoned. [His Lordship then read the letter.] It was contended that the whole of this proceeding was against *the policy of the law, and that the defendants had made an improper use of criminal proceedings to obtain this apology. No authority was cited for this proposition. The same apology might have been given and accepted if a suit in this court had been threatened. This is one of those misdemeanors where the person injured has the choice between a civil and a criminal remedy. It was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway. Offences of this kind are indictable, but it is not against the policy of our law to allow the injured person to enter into a compromise with regard to them. Fisher said that he bought the water, but rather eluded the main question; the company, however, accepted the apology, and were authorized by Fisher to use it as they pleased. This was the bargain which was come to by Fisher with full knowledge of what he was doing; and the defendants have simply done what he authorized them to do. The publication under such circumstances can hardly be a libel, and even if it was, there is abundance of authority that this court has no jurisdiction to restrain the publication of a libel merely because it is a libel.

But the plaintiffs further complain that the defendants are using this letter in a way which will do them material damage. I am not aware of any principle on which this court can say whether such a thing can be used one hundred times or once. Fisher had at his trial the benefit of the apology, and I cannot see on what ground of equity this bill rests. It was said that the publication would damage Fisher's character, and therefore, indirectly, the property of the company who had bought his business. That really amounted

to nothing but this, that the publication was a libel. The bill is not sustainable, and the demurrer ought to have been, and must be now, allowed with costs. There will be no costs of the appeal.

SIR G. MELLISH, L.J.: I am of the same opinion. The question is, whether on this bill there appears any ground upon which a court of equity can restrain the publication of this apology. The most plausible *ground alleged is, [303 that it was obtained under duress of criminal proceedings. But, in the first place, the bill does not allege that the apology was written before the acquittal, and even if the apology was written before the acquittal, that would be no reason for the interference of this court. If this was any ground for restraining the publication, it would be a ground for restraining the first publication.

But, in my opinion, there is no objection to the compromise of a charge of this sort on such terms. The complaint was that Fisher had used the trade-mark of this company. Now, previously to the Trade Marks Act (25 & 26 Vict. c. 88), the sole remedy for the wrong complained of by the company would have been by action at law or suit in equity, but under this act the wrong became also the subject of a criminal prosecution. There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. The prosecutors allowed him to state that his offence was not wilful, and accepted an apology. Such compromises are constantly made before criminal courts in cases of assault or libel. In some cases there is a payment of money; in other cases, no payment at all; and it has never been considered that there was anything wrong in such transactions. It would, of course, be different if there was any case alleged of extorting money under threats.

It is clear, therefore, that the first publication could not have been stopped; and it is clear that, the first publication being lawful, there would, in the absence of any special agreement, be no ground for restraining the subsequent publication. No such agreement is alleged, and the defendants are positively authorized to make such use of the letter as they may think necessary. The defendants have been guilty of no legal wrong, and I cannot see that they are not entitled to publish this letter merely because it affects Fisher's character.

Solicitors: Mr. A. E. Copp; Mr. Hacon.

It has been held that in order to avoid an agreement of menace of arrest it must be of a lawful imprisonment: *Knapp v. Hyde*, 60 Barb., 80.

But the better doctrine is that it is immaterial whether the imprisonment be legal or illegal: *Osborn v. Robbins*, 36 N. Y., 365, 371; *Bush v. Brown*, 49 Ind., 573, 578; *Strong v. Grannis*, 26 Barb., 123; *Richards v. Vanderpoel*, 1 Daly, 71; *Phelps v. Zuschlag*, 34 Texas, 371; *Brownell v. Talcott*, 47 Verm., 243.

Mere threats of criminal prosecution do not constitute duress without threats of immediate imprisonment. The threats of personal injury which the law considers duress are such as constitute an impending danger to life, or of serious bodily harm sufficient to overcome the will of a man of ordinary firmness: *Lester v. Union, etc.*, 3 N. Y. Supreme Court Rep., 657, 1 Hun, 288; *Harmon v. Harmon*, 61 Maine, 227; *Ditler v. Johnson*, 37 Texas, 47; *Davis v. M. & C. R. R.*, 46 Mississippi, 552; *Bosley v. Shanner*, 26 Ark., 280; *Brownell v. Talcott*, 47 Verm., 243; *Feller v. Green*, 26 Mich., 70.

But see 1 Chitty on Cont., 11th Am. ed., 269; *Bush v. Brown*, 49 Ind., 573, 577.

It is not necessary the threats should be made at the time of obtaining the obligation. It is void though they had been previously made, if not withdrawn, and the maker be induced thereby to enter into the contract: *Taylor v. Jacques*, 106 Mass., 291.

A note exacted from one under arrest upon a criminal charge by the party who procured his arrest, as a settlement of claims held against him, is void in the hands of one who took it with knowledge of the facts; and this notwithstanding the note was taken in settlement of a civil claim for damages only, and without compounding the criminal charge: *Osborn v. Robbins*, 36 N. Y., 365, 4 Abb. Prac., N. S., 15, reversing 37 Barb., 481; *Chandler v. Johnson*, 39 Geo., 85; *Bush v. Brown*, 49 Ind., 573; *Richards v. Vanderpoel*, 1 Daly, 71; *Foshay v. Ferguson*, 5 Hill, 154; *Williams v. Bayley*, L. R., 1 House of Lords, 200; *Seiber v. Price*, 26 Mich., 518.

But see *Hoover v. Wood*, McCahan (Kans.), 79; *Nickelson v. Wilson*, 60 N. Y., 362.

And so notwithstanding the full amount of the note be due: *Osborn v. Robbins*, 36 N. Y., 371-2; *Taylor v.*

Jacques, 106 Mass., 291; *Phelps v. Zuschlag*, 34 Texas, 371.

But see *Ditler v. Johnson*, 37 Texas, 47; *Nickelson v. Wilson*, 60 N. Y., 362.

An instrument executed in part performance of a plan to stifle a criminal prosecution is void: *Bettinger v. Bridenbecker*, 63 Barb., 395.

If it recite that it was so made parol evidence that no such object was talked of or contemplated is inadmissible: *Bettinger v. Bridenbecker*, 63 Barbour, 395.

It has been held that an agreement with one jointly indicted with others, that in case he will testify fully and candidly, the facts will be presented to the court with a recommendation on the part of the prosecutor or prosecuting officer that a *nolle prosequi* be entered as to him, is not against public policy, and that an agreement based thereon would be enforced: *Nickelson v. Wilson*, 60 N. Y., 362.

An employer, whose business requires the employment of workmen, may recover back money he was induced to pay in consequence of a conspiracy, and threatening to induce workmen to leave his employment, so as to render him reasonably apprehensive that he cannot carry on his business without making the payment: *Carew v. Rutherford*, 106 Mass., 1.

A surety may avail himself of the defence of duress of the principal debtor: *Strong v. Grannis*, 26 Barb., 122; *Osborn v. Robbins*, 36 N. Y., 372; *Fisher v. Shattuck*, 17 Pick., 253.

Otherwise in Kentucky: *Thompson v. Buckhannon*, 2 J. J. Marshall, 416.

Duress cannot be pleaded by a stranger to the instrument: *McClintick v. Cummins*, 3 McLean, 158.

But the owner of property may avail himself of duress of his bailee which induced the bailee to part with the property: *Koehler v. Wilson*, 40 Iowa, 188.

Terrifying a married woman into giving a note by fears of arrest of her husband renders it void: *Eadie v. Simmon*, 26 N. Y., 9; *Decker v. Morton*, 1 Redf. (Surr.) R., 477; *Williams v. Hayward*, 117 Mass., 532.

The facts showing duress must be pleaded. The court must be able to see from the facts stated that the payment was in fact compulsory, or that the

L.JJ.

Ex parte Jardine. In re McManus.

1875

party entered into the contract under duress. It is not sufficient to allege in a general way that the payment was compulsory and not voluntary: *Com-*

mercial Bank v. City, etc., 41 Barb., 341, affirmed by Court of App., 41 N.Y., 619. See *Richards v. Vanderpoel*, 1 Daly, 71.

[Law Reports, 10 Chancery Appeals, 322.]

L.JJ. Feb. 19, 1875.

**Ex parte JARDINE. In re McMANUS. [322*

Deed—Parcels—Reference to Contemporaneous Inventory—Enlarging Operation of Deed.

A mortgage of a foundry, with the engines, fixtures, machinery, tools, and working plant therein, described the chattels assigned as being "more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto, and read and construed as forming part of these presents." The deed contained no mention of stock-in-trade. The inventory, which was signed by the mortgagors on the same day as the deed, extended over twenty-one pages. The first twenty pages contained a detailed description of the engines and other chattels which were mentioned under general heads in the deed. At the bottom of page 20 was this clause: "The stock-in-trade consists of bolts, brass work, wrought and cast iron work, brass and other work, both finished and in preparation." And at the top of page 21 were these words: "Also all cast and wrought iron, steel, timber, and all other stock-in-trade in and upon the before-mentioned foundry, workshops and premises." Then came this clause: "The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils, and things in, upon, or about the foundry mortgaged by us this day." This was immediately followed by the signatures of the mortgagors:

Held (affirming the decision of the Chief Judge), that the stock-in-trade was not included in the mortgage.

THIS was an appeal from a decision of the Chief Judge.

On the 1st of August, 1873, Michael McManus and George Louis Frost, who were then carrying on the business of iron-founders in *partnership at the St. Paul's Foundry, [323 Blackburn, executed a mortgage in fee of their foundry, and a bill of sale of their steam-engines, fixtures, tools, and working plant, to William Jardine, to secure the repayment of £4,000 with interest.

The chattels assigned by the deed were thus described:

"All those, the steam-engines, boilers, mill-gearing, shafting, steam, gas and water-piping, shelving, wall or other boxes, counter swivels, loom bins, boring mills, pulleys, spindles, steam-hammers, weighing machine, moulding machine, travelling and other cranes, fans, cupolas, drums, turning, drilling and other lathes, and all other fixtures, machinery, implements, utensils, tools, and all other the working plant, being in, upon, and attached, or fixed immediately or mediately to, or used in or about the said plot of land and buildings, or any part thereof, and more particularly enumerated and specified in an inventory of even date

1875

Ex parte Jardine. In re McManus.

L.JJ.

herewith, to be signed by the parties hereto, and read and construed as forming part of these presents."

The *habendum* was to hold the land and buildings, and such part of the steam-engines and other premises granted and assigned as were of the nature of fixtures, to Jardine in fee, subject to redemption as therein mentioned, and to hold such parts of the premises as were not of the nature of fixtures to Jardine absolutely, subject to redemption as therein mentioned.

The deed contained a power of sale by the mortgagee in case of default in the payment of principal or interest on the day appointed for payment, and a power for the mortgagee in case of such default to enter into and take possession of all or any of the hereditaments and premises granted and assigned by the deed. There was also a covenant that the mortgagors would not pull down or remove the hereditaments and premises expressed to be thereby granted and assigned respectively without the permission of the mortgagee, unless in cases where such pulling down or removal should be rendered necessary by any of the premises being worn out or injured, and in such cases that the mortgagors should replace the premises or articles worn out or injured by others of at least equal value, and that they would, 324] during the *continuance of the security, keep the hereditaments and premises, and every part thereof, in a good state of repair and in perfect working order.

There was also this clause :

"And it is hereby agreed and declared that any buildings, machinery, implements, utensils, and working plant which shall be erected or placed upon, or used, or be in or about the said hereditaments hereinbefore expressed to be hereby granted, or any part thereof, during the continuance of this security, either in lieu of or in addition to any buildings, engines, machinery, implements, utensils, or working plant now standing or being there, shall be included in the present security, and be subject to the provisions and covenants herein contained."

There was no mention of stock-in-trade in the deed.

The inventory referred to in the deed was signed by the mortgagors on the 1st of August, 1873. It was headed thus :

"Description, measurement, and inventory for valuation of the St. Paul's foundry, workshops, and premises, situate in Nab Lane, Blackburn, in the county of Lancaster ; also of the steam boiler, steam shafting, piping, tools, working plant, machinery, and all other attached fixtures and fittings,

smiths' hearths, office furniture, and other effects, the property of Michael McManus and George Louis Frost, as valued by us whose names are hereunto subscribed, this 26th of July, 1873."

The inventory was contained in twenty-one pages, which included a description in detail of the fixtures and other articles in each room or shop of the foundry and offices thereto belonging, followed by a detailed description of loose working plant, such as moulding boxes, tools, and patterns. At the bottom of page 20 were these words:

"The stock-in-trade consists of bolts, brass work, wrought and cast iron work, brass and other work, both finished and in preparation."

Page 21 was as follows:

"Also all cast and wrought iron, steel, timber, and all other *stock-in-trade in and upon the before-men- [325 tioned foundry, workshops and premises.

"The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils, and things in, upon, or about the St. Paul's Foundry, Blackburn, mortgaged by us this day to Mr. William Jardine for securing the sum of £4,000 and interest.

"Dated this 1st of August, 1873."

Then followed the signatures of Frost and McManus.

The deed was registered under the Bills of Sale Act.

On the 18th of October, 1873, Frost died, and the business was thenceforth carried on by McManus alone. Default was made in payment of the mortgage money, and on the 1st of February, 1874, Jardine took possession under the deed. McManus, in April, 1874, filed a liquidation petition, and the question arose between Jardine and the trustees under the liquidation whether the debtor's stock-in-trade was included in the mortgage. Jardine claimed it under the deed and inventory, and had taken possession of it as included in his security. The Judge of the Blackburn County Court by his order declared that the stock-in-trade was not included in the security, but was the property of the trustees, and this decision was affirmed by the Chief Judge⁽¹⁾. Jardine appealed.

(1) 1875. Jan. 18.

SIR JAMES BACON, C.J.: Mr. Ambrose has very properly said that this case must be determined according to the true intention of the parties. But in considering the intention of the parties, I must have strict and due regard to the instrument by which that intention is expressed. Departing,

however, from that for a moment, if I were to consider what was likely to be the intention of these parties, what circumstances present themselves to my mind? Evidence there is none on the subject that I know of, and I have heard of none. Two traders, being manufacturers in, as it seems from the inventory, a very large way of busi-

326] *Mr. Ambrose, Q.C., and Mr. North for the appellant.

Mr. Little, Q.C., and Mr. Smyly for the trustees, were not called upon.

*SIR W. M. JAMES, L.J.: There is no doubt about this matter. The deed is as clear as a deed can be, and shows no intention to include, but a plain intention to exclude, the mess, have occasion to borrow £4,000, and they borrow it on a mortgage of their property. To what end? In order that they may carry on their business. It would require a plain and distinct stipulation before I could entertain the notion that it was their intention to mortgage their stock-in-trade. But if it was their intention to give an equitable charge on it, as in *Brown v. Bateman* (Law Rep. 2 C. P., 272), they could not proceed to sell anything without the permission of the mortgagee, and such an intention seems to me to be totally foreign to the contemplation of the parties. They may well have intended to give to the mortgagee as large a security as they could over their whole available property, from the real property down to the working plant, but I cannot impute to them an intention to give a charge upon the things that they were at work upon every day, although those things may be mentioned in the inventory. When I look at the deed I find it to be consistent with that which I must take to have been their intention, and with nothing else. The deed is not unskilfully prepared. It appears to me, so far as I have looked at it, to have come from the hands of a person who knew his business very well, and who intended to throw the net very widely, and to give to the mortgagee all that it could be the intention of the parties to give him. [His honor read the description in the deed of the property assigned.] I cannot extend that to whatever I find in the inventory. I must look at the words and see what things are "more particularly enumerated and specified," but I am not at liberty, by means of the inventory, to include things which were not in the contemplation of the parties, and which are covered by no one of the words by which they have expressed their intention in the deed. Reading the inventory in that way, the stock-in-trade seems to me to be out of the question. First, it is not mentioned in the deed, and I cannot assume that it was in the contemplation of the parties. Then, I am told that the inventory is referred to in the deed, and extends the operation of the deed. The history of the inventory I do not know—but it describes itself thus: [His honor read the heading of the inventory.]

Now if it were a mere valuation, it would be quite proper that everything should be included, and that is the purpose for which it seems to me that this inventory was originally made. Then a very long inventory follows this description, including the whole of the things which are mentioned in the deed, some by a very particular, some by a very general description. [His honor then read the passages referring to the stock-in-trade and the memorandum at the end, and continued:] That by no means leads to the inevitable conclusion that the stock-in-trade was to be included in the mortgage. The stock-in-trade is said to consist of certain things; the memorandum states that the inventory consists of twenty sheets, and that the contents of the twenty sheets are a complete and exact inventory of the things in and upon the St. Paul's Foundry mortgaged to Mr. Jardine as security for £4,000. That does not by any means add to the expressions in the deed; it does not mention the stock-in-trade, which, as I have said, by the general intention of the parties (which I quite admit ought to prevail), it could not be in their contemplation to include in the mortgage. In terms it is not included in the mortgage, and I can see no ground whatever upon which the mortgagee, whose right to the property mortgaged, down to the working plant, is conceded by the trustees, can also claim that stock-in-trade which it was never in the contemplation of either party should be included in the mortgage. Authorities

stock-in-trade. The words in the witnessing part are precise, and it has not been attempted to be argued that they could, taken by themselves, include stock-in-trade. The clause as to replacing things worn out clearly applies only to what has been assigned, and does not alter the case. But it is said that the words are enlarged by the inventory. The inventory is not a part of the deed, but is made a part of it, for the purpose of giving a more detailed description of the articles included in the deed. This inventory also contained a list of things of an entirely different nature, and the argument is, that therefore they are included in the deed. In my opinion, the reference to the inventory has no such effect. If something clearly within the terms of the deed had been omitted from the inventory, such omission would not have prevented its passing by the deed. So, on the other hand, we cannot hold the scope of the deed to be enlarged by a mere reference to a detailed catalogue of the things which were intended to be conveyed. Even if an express intention to include articles not coming within the terms of the deed had been shown by a separate writing, that could not have made the deed operate in a way inconsistent with its plain terms, however it might lay *ground for rec- [328 tifying it. But in the present case it is impossible to conclude that the parties had any intention to include the stock-in-trade.

SIR G. MELLISH, L.J.: I am of the same opinion.

Solicitors for the appellant: Messrs. *Pritchard, Englefield & Co.*, agents for Messrs. *Boote & Edgar, Manchester.*

Solicitors for the trustees: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale & Co., Manchester.*

have been cited, and I quite agree that an inventory, when properly referred to, is to be read as part of the deed which refers to it. I do not dispute that *Brown v. Bateman* was well decided; it would not become me to do so. But in that case the landlord, by the instrument which had there to be considered, had stipulated that if the tenant, who was a builder, should bring on the land any materials for building houses, they should be considered as immediately attached to the premises, and should not be removed without the landlord's consent. That

has no reference whatever to the case before me. There is no such stipulation here. If there had been a stipulation that the mortgagors should carry on the business and render accounts, showing the mortgagees how they were dealing with the stock-in-trade, it might be said that *Brown v. Bateman* had some application; but as the case stands it has no application whatever. I conceive that the order now appealed from is right, and that it must be retained. The appeal must, consequently, be dismissed.

[Law Reports, 10 Chancery Appeals, 340.]

LJJ., March 22, 1875.

340]

*VALE v. OPPERT.

[1873 V. 2.]

Practice—Production of Documents—Solicitor's Lien.

A defendant, shortly after filing an affidavit as to documents, entered into liquidation of his affairs by arrangement. Some time afterwards he changed his solicitors. The plaintiff applied for production of the documents, which the defendant resisted on the ground that they were in the possession of his former solicitors, who claimed a lien on them:

Held (affirming the decision of Bacon, V.C.), that an order for production must be made, with liberty to apply in case the defendant found it impossible to produce the documents, the plaintiff not to attach the defendant without leave of the court.

Per James, L.J.: A solicitor cannot set up a lien acquired in a cause as against the right of other parties in the cause to production.

THIS was a motion by the defendant by way of appeal from an order of Vice-Chancellor Bacon for the production of documents.

The bill was filed on the 9th of January, 1873, for the dissolution and winding-up of a syndicate or partnership for working certain mines in Ireland of which the defendant Oppert had been treasurer. On the 3d of April, 1873, Oppert filed the usual affidavit as to documents. At that time Messrs. Elmslie, Forsyth & Sedgwick were his solicitors. In the same month Oppert took proceedings under the Bankruptcy Act for liquidation of his affairs, and a resolution was duly passed for their being liquidated by arrangement. McLean was appointed trustee.

On the 15th of May, 1874, Oppert obtained the usual order to change his solicitors.

On the 26th of January, 1875, the plaintiff took out a summons for the production of the documents mentioned in the first part of the schedule to the affidavit of the 3d of April, 1873, except such of them as McLean had by affidavit filed on the 21st of January, 1875, admitted to be in his possession as trustee. On the 2d of February Oppert filed, in opposition, an affidavit as follows:

"At or immediately prior to deposing to my affidavit as to documents filed in this cause on 3d April, 1873, I handed over to Messrs. Elmslie & Co., who acted for me as my solicitors in this *cause until the 15th May, 1874, all the papers and documents mentioned in the schedule to my said affidavit, with the exception of such of the said documents as are included in the schedule to the affidavit of the defen-

dant, R. McLean, my trustee, filed in this cause on 21st January, 1875.

"I have not now, nor have I since the said 3d day of April, 1873, had in my possession, custody, or power, or in that of my present solicitors, any of the papers or documents so included in the schedule to my said affidavit filed on the 3d of April, 1873, as aforesaid; but the same are, I believe, still in the possession, custody or power of either the said Messrs. Elmslie & Co., or of the said defendant, R. McLean, as my trustee as aforesaid."

The managing clerk of the plaintiff's solicitors deposed that Messrs. Elmslie & Co. had at first refused to allow inspection of the documents in their possession, but had afterwards withdrawn this refusal and produced certain documents, being only a small part of those required, stating at the same time that they had no others.

Oppert deposed that Messrs. Elmslie & Co. claimed a lien upon the documents.

The summons was adjourned into court, and Vice-Chancellor Bacon made an order on Oppert for production, as asked by the summons.

Mr. *E. Cutler*, for the appeal motion, referred to *Palmer v. Wright* ('); *North v. Huber* ('); *Re Williams* (').

Mr. *Locock Webb*, for Oppert: If documents are in the possession of a solicitor who claims a lien, the party may be ordered to produce them, and if he cannot produce them, without paying the solicitor's bill, he must do so: *Ex parte Shaw* (').

[THE LORD JUSTICE JAMES: That, no doubt, is the general rule; but may not the case of a party who has become bankrupt and is unable to pay anything be an exception?]

*The evidence does not clearly show that Oppert [342 cannot get the documents. In *Palmer v. Wright* (') the papers were not in the possession of the defendant's solicitor, but of the solicitor of his testator; in *North v. Huber* ('), in the possession of an auctioneer, who claimed a lien; and in *Re Williams* ('), in the possession of another party. The decision in *Rodick v. Gandell* (') is precisely in point in the present case.

Mr. *Cutler*, in reply, referred to *Liddell v. Norton* (').

SIR W. M. JAMES, L.J.: I think that the order of the Vice-Chancellor must be affirmed. If an order for produc-

(1) 10 Beav., 234.

(2) 7 Jur. (N.S.), 767.

(3) 7 Jur. (N.S.), 823.

(4) Jac., 270.

(5) 10 Beav., 270.

(6) Kay, App., xi.

tion were refused, we should be enabling defendants to resort to the device of delivering documents to their solicitor, changing him, and then refusing production on the ground that they were unable to pay his bill. That is a device which the court cannot encourage. The order of the Vice-Chancellor must stand, but the defendant must have liberty to apply if it turns out that he really cannot get the documents produced. He will not, however, be excused on the ground of his making a mere formal application to Messrs. Elmslie & Co., as if he did not care whether he got them or not; he must satisfy the court that he has done his best to comply with the order: and the plaintiff must not issue an attachment without the leave of the court.

SIR G. MELLISH, L. J., concurred.

SIR W. M. JAMES, L.J.: Messrs. Elmslie & Co. are not likely to refuse production on the ground of their lien, for a solicitor has no right to set up a lien acquired in the cause against the rights of the other parties in the cause to production.

Solicitors: Messrs. *Vallance & Vallance*; Messrs. *Lawrence, Plews & Co.*

[Law Reports, 10 Chancery Appeals, 343.]

L.JJ. March 3, 10, 11, 24, 1875.

343]

*FOWKES v. PASCOE.

[1873 F. 35.]

Purchase in Joint Names—Gift—Resulting Trust—Evidence—Presumption—Ademption.

A testatrix, both before and after she made her will, purchased sums of stock in the names of herself and the son of her daughter-in-law. By her will she gave the residue of her estate to her daughter-in-law for life, and after her death to the son and the daughter of the daughter-in-law:

Held, that, under the circumstances, the sums of stock so purchased were a gift to the son of the daughter-in-law:

Held, that in such a case the evidence of the son and his wife was admissible, and could not be disregarded as rebutting the presumption of a resulting trust; and that, coupled with the circumstances under which the stock was purchased, it was sufficient to rebut the presumption:

Held, on the facts, that the testatrix had not placed herself *in loco parentis* to the son of her daughter-in-law or to the other residuary legatee, and that both these facts would have to be proved to make the gift an ademption of the residuary bequest.

Decision of the Master of the Rolls reversed.

SARAH BAKER, the testatrix in this cause, had one child only, a son, who had died, leaving a widow. The widow of the son married again, and was then called Elizabeth Ann Pascoe. She had by her second husband several children, of

whom two only, John Irving Pascoe and Mary Ann Pascoe (afterwards Mary Ann Heritage), survived Sarah Baker.

Sarah Baker, by her will, dated the 9th of November, 1843, devised certain real estate to John Irving Pascoe. She then devised and bequeathed her leaseholds and personalty and the residue of her realty to trustees, one of whom was John Irving Pascoe, upon trust to convert the same and to invest the proceeds, and out of the income of the investments to pay certain life annuities, and subject thereto to pay the income to Elizabeth Ann Pascoe for her life; and the testatrix directed her trustees to divide the principal, after the death of Elizabeth Ann Pascoe, between such of the children of Elizabeth Ann Pascoe as should attain the age of twenty-one years. The testatrix further directed that £100 a year should, during the life of Elizabeth Ann Pascoe, be paid *to [344 such of her daughters as had attained the age of twenty-one years.

On the 2d of March, 1843, Sarah Baker had bought £250 3½ per Cent. Reduced Annuities, afterwards 3½ per Cent. Annuities, in the names of herself and one Mary Clapham, who resided with her; and had bought £250 3½ per Cent. Reduced Annuities in the names of herself and John Irving Pascoe. On the 29th of August, 1845, Sarah Baker bought two further sums of £250 like annuities in the names of herself and John Irving Pascoe. From time to time Sarah Baker bought further sums of like annuities in the names of herself and John Irving Pascoe, till the sum amounted to £2000 3½ per Cent. Annuities. On the 15th of August, 1848, Sarah Baker transferred £4,000 3½ per Cent. Annuities into the names of herself and John Irving Pascoe; and a short time before her death she bought a further sum of £1,000, making the total sum standing in the names of herself and John Irving Pascoe £7,000.

On the 3d of December, 1850, Sarah Baker died; and soon afterwards John Irving Pascoe caused the £7,000 to be transferred to his own name.

Elizabeth Ann Pascoe died on the 12th of March, 1872; and thereupon John Irving Pascoe and the trustees of the settlement made on the marriage of Mary Ann Heritage, the other surviving child of Elizabeth Ann Pascoe, as assignees from Mary Ann Heritage, became entitled to the residuary estate of the testatrix Sarah Baker.

The trustees of the settlement filed a bill against John Irving Pascoe and his co-trustee under Sarah Baker's will for the administration of the estate of Sarah Baker. The principal object of the suit was, however, to determine

whether John Irving Pascoe was entitled to the £7,000 3¼ per Cent. Annuities which he claimed as a gift. He also claimed the dividend, due at the death of the testatrix, on the £6,000 3¼ per Cent. Annuities.

John Irving Pascoe deposed that the £7,000 was intended as a gift to him; and his evidence was supported by that of his wife and of two servants. The further facts of the case and the evidence are fully stated in the judgment of Lord Justice James.

The Master of the Rolls was of opinion that Mr. Pascoe 345] was *trustee of the £7,000 for Mrs. Baker, and made a decree for the administration of the estate of Mrs. Baker, adding to it a declaration as to the trust of the £7,000 (').

Mr. *Pascoe* appealed against the decree so far as related to the declaration.

Mr. *Chitty*, Q.C., and Mr. *W. H. Thompson*, for the appellant: No doubt when you find a man investing in the names of himself and another, the presumption is that there is a result- 346] ing trust *for himself; but that presumption may easily

(') 1874. Nov. 17.

SIR G. JESSEL, M.R., after stating the facts of the case, said that there was no presumption in favor of a gift, as Mr. Pascoe did not attempt to say that he was an adopted son of the testatrix.

His honor did not understand that the law of this court made any difference between a transfer and a purchase—a purchase of stock in the joint names of the beneficial owner and another, or a transfer from that beneficial owner in the joint names of himself or herself, or a transfer to a third name from the beneficial owner into another name. In either case, in the absence of evidence to the contrary, there was a resulting trust in favor of the beneficial owner. That being so, if there was no evidence and no case of adoption, or putting herself in the position of a parent, it would follow that this property remained the property of Mrs. Baker; therefore the only two questions to be considered were, first, whether there was any case of *quasi* parentage raised, because if not raised by the answer the evidence need not be considered; and, secondly, if such a case was not made out, whether there was a case of clear gift. It must be shown to be a clear gift, because persons in intimate relations with aged ladies not blood relations, not having actual claims on their

bounty by reason of any act done by the aged person in question to make it a moral duty on her to provide for them, must show by clear evidence that when she parted with her property she intended to give it out and out after her own decease. That is not only a rule of law, but a rule founded on sound policy and good sense. Those that allege that other people, especially in this position, give them large sums of money, must prove it, and prove to the satisfaction of a court of justice that they are entitled to that sum of money. His honor then commented on the answer and the evidence, and said that no case of adoption was either set up or proved. Nor was there evidence of an expressed intention to make a clear gift. The only evidence was that of Mr. Pascoe and his wife. The evidence of a wife was not equal to that of a second witness, as no doubt the husband and wife had talked it over, and she might be led to believe that what the husband told her was a fact. This evidence standing alone was not sufficient to make the court impute to the testatrix an intention of giving this property to Mr. Pascoe. Upon the whole, his honor was of opinion that Mr. Pascoe must be treated as trustee of the whole sum of £7,000 3¼ per Cent Annuities.

be rebutted: *Dyer v. Dyer* ('); *Rider v. Kidder* ('); especially when the person who invested stood *in loco parentis* to the other: *Powys v. Mansfield* ('); *Dummer v. Pitcher* ('). Actual relationship is not necessary: *Sayre v. Hughes* ('); *Currant v. Jago* ('). We do not, however, say that Mrs. Baker had actually adopted Mr. Pascoe as her son, but she had so much regard and affection for him as to make the gift not at all improbable: *Nicholson v. Mulligan* ('). All the evidence is on our side; there is none against us: *In re Curteis's Trusts* ('); *George v. Howard* (').

Mr. Southgate, Q.C., Mr. Waller, Q.C., and Mr. Davey, for the plaintiffs: If the testatrix intended to give so large a sum, can it be believed that she would not have said more about it? With the exception of *George v. Howard*, there is no authority for the distinction between a stranger and a relation in the case of an alleged gift. Where a person invests money in the name of himself and another, the presumption is that the other person is merely a trustee; and there is not evidence enough in this case to rebut that presumption.

Even if the £7,000 is held to be a gift, it must be taken as an ademption of the share given by the will: *Pym v. Lockyer* ('); and the mere circumstance of there being no relationship between the parties will not alter the case. *Montefiore v. Guedalla* ('), *Dawson v. Dawson* ('), *Cooper v. Macdonald* ('), *Leighton v. Leighton* ('), and *Meinertzen v. Walters* ('), show what the principles are. On the evidence it is clear that Mrs. Baker put herself *in loco parentis* to Mr. Pascoe, and therefore all the gifts made after the date of the will are in the nature of an advancement, which he must bring into hotchpot. If Mrs. Baker did not stand [347 *in loco parentis*, then the presumption of law against the money being intended as a gift is still stronger.

Mr. Chitty, in reply.

March 25. SIR W. M. JAMES, L.J.: The case of the plaintiffs is simply this: Certain sums of stock have been discovered to have been standing in the joint names of a lady deceased and the defendant John Irving Pascoe. They were partly purchased with the lady's money, partly transferred

(1) 2 Cox, 92.

(2) 10 Ves., 360.

(3) 3 My. & Cr., 359.

(4) 2 My. & K., 262.

(5) Law Rep., 5 Eq., 376.

(6) 1 Coll., 261.

(7) 3 Ir. Rep. Eq., 308.

(8) 8 Law Rep., 14 Eq., 217.

(9) 7 Price, 646.

(10) 5 My. & Cr., 29.

(11) 1 D., F. & J., 93.

(12) Law Rep., 4 Eq., 504.

(13) Law Rep., 16 Eq., 258.

(14) Law Rep., 18 Eq., 458.

(15) Law Rep., 7 Ch., 670.

from her name to the joint names. This, it is alleged, proves a resulting trust for the lady. And it is further alleged that the onus of rebutting the presumption of resulting trust is on the defendant, and that he has failed to discharge himself. The Master of the Rolls was of that opinion, hence this appeal.

The relations between the lady and the defendant were of a character very natural, but singular in this respect, that nothing like them appears to have occurred in any of the reported cases.

Mrs. Baker was a widow lady of considerable property. She was, at the time of the transactions in question, childless, but she had had an only son, who had left a childless widow. The younger widow lived with her father-in-law and mother-in-law, and after the death of the father-in-law, with the latter, whose home was her home, until she found a second husband, whom she married from that home. This marriage does not appear to have diminished the feelings of maternal and filial affection between the mother-in-law and the daughter-in-law. Everything in the case shows that the mother-in-law looked upon her daughter-in-law, her children, and grandchildren as if they had been her own descendants, the issue of her own body. There was, amongst other issue of the second marriage, a son, the defendant, and two daughters, one deceased, the other Mary Ann Heritage, whose trustees are the present plaintiffs. The son, when a youth, and for some years from and up to his marriage, lived with Mrs. Baker. In course of time, that is to say, in the year 1844, he married and had children. He resided after his 348] marriage near Birmingham, *but whenever he came to London he made his abode in Mrs. Baker's house. His children were actually brought from Birmingham to London to her house to be baptized from there at her church, and by her clergyman, and the likenesses of the little ones were the favorite ornaments of her room. [His Lordship read the evidence on this subject.] She made her will in the year 1843. By that will she gave certain real property to the defendant, and the residue of her property, which was large, she gave to her daughter-in-law for life, charged with annuities for the daughters, and after her death it was to go to the children of the daughter-in-law.

This, then, was the relationship between the parties when the facts happened from which the present suit has arisen. [His Lordship then stated the manner in which the purchases and transfer had been made.] Of these sums, amounting to

£7,000, the defendant has been declared to be a trustee for the estate of Mrs. Baker.

I will assume, for the present purpose, that the origin and nature of the relations between the parties did not affect the legal presumption of resulting trust. I will assume, further, that the implication of a resulting trust does arise as much in the case of a transfer as in that of a purchase of stock, although, that certainly is not the case with regard to a conveyance of land; and I will proceed to consider how the evidence stands on these assumptions. To my mind, differing in this respect altogether from the Master of the Rolls, the evidence in favor of gift and against trust is absolutely conclusive. There is, to begin with, in respect of the two first purchases, an inference from the facts themselves which is, to my mind, irresistible. Whatever may be the presumption as to one purchase or one transfer standing by itself, the fact of the contemporaneous purchases of small distinct sums in different names,—in the name of a *quasi* son or grandson, and of a companion, and the subsequent repetition of those purchases, is not to be got over. The lady had £500 to invest; she had already large sums of stock standing in her own name, besides other considerable property. Is it possible to reconcile with mental sanity the theory that she put £250 in the names of herself and her companion, and £250 into the names of herself and defendant, as *trustees upon trust for herself? What [349 trust—what object is there conceivable in doing this? If this case were tried before a jury, no judge could withdraw the facts of the contemporaneous purchases and of their repetition from the consideration of a jury, and, in my opinion, no jury would or could be found who would hesitate to say that the thing was done by way of gift and not trust.

Starting with this, that the original purchase was gift and not trust, it appears to follow that the subsequent additions must be of the same nature; and the piecemeal nature of these additions is pregnant with the same inference. But the case is far from resting here. The defendant swears positively to their having been gifts, and although I concur in what the Master of the Rolls has said, and although this court has more than once said that it is too dangerous to rely on the mere evidence of a party interested as to conversations with a deceased person, yet it is legally admissible evidence, and is not to be disregarded when adduced by a man in support of his claim to that which is indisputably his at law, and which an attempt is made to deprive him of. Where the Court of Chancery is asked, on an equitable as-

sumption or presumption, to take away from a man that which by the common law of the land he is entitled to, he surely has a right to say : "Listen to my story as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances." The evidence is to be weighed, of course, with reference to that danger, but still is to be weighed like every other piece of evidence, together with every other fact and inference in the case.

[His Lordship then stated and commented on the evidence of John Irving Pascoe and of his wife, observing that his story was highly probable and credible, and coming to the conclusion that if the onus was on the defendant he had proved his case.]

It was, however, contended that if, under the circumstances, the theory of gift would prevail, the same circumstances and evidence would show that the gift was so made as to be an ademption or partial satisfaction of the share of the residue to which the defendant was entitled under the will. And if one were permitted to guess—if one were permitted to ask on any instinctive feeling of what probably was the testatrix's intention, that is probably the result which the court would arrive at.

350] *But is it possible, consistently with established rules, to arrive at that result? In the first place, no parol evidence of such an intention is admissible, for such parol evidence would be to alter the written will. That effect if produced at all must be produced by operation of law. The rule of law is that legacies given by a father, or a person *in loco parentis*, are or may be adeemed by gifts between the will and the death. The principle is that the will shows the distribution which the father thinks just and expedient for his children, and if, after having made such a scheme for distribution, he advances one of his children on marriage, or going out to establish himself in the world, or the like, it is to be presumed, as a *presumptio juris et de jure*, that the advancement is an anticipation of the testamentary provision, just as under the Statute of Distributions an advancement is to be brought into hotchpot. But this presumption applies only to fathers, or persons who have put themselves *in loco parentis*. What in any particular case is putting oneself *in loco parentis*, is probably one of the most difficult legal problems to solve. It used to be laid down in the treatises that nothing short of assuming the whole functions and duties of the father would do, and in particular that such a character could not be predicated where the child was actually living with her own father and maintained by him,

and could not be predicated even between a grandfather and grandson if the father were alive. But in the case of *Pym v. Lockyer* ⁽¹⁾, before Lord Cottenham, that rule was certainly not acted on to the full extent. [His Lordship then read the facts of the case in *Pym v. Lockyer*.] That case went beyond the former rule, but even that case must be considerably extended in order to meet the case before us. In that case the grandfather had directed and controlled the children, had been referred to on the treaties for their marriages, and had provided marriage portions for them. Nothing of the kind took place in this case. There are very strong expressions about adoption, proved by the defendant himself, but it does not appear that Mrs. Baker ever did provide, or had occasion to provide, for the maintenance, education, marriage portion, or setting out in the world of the children of her daughter-in-law, except that the son did live with her a few years before *his marriage, and had [351 a handsome present on his marriage. What she did was, that, having no nearer or dearer object of her testamentary bounty, she selected her daughter-in-law and the children of her daughter-in-law to be her heirs, and all her expressions and her conduct are to be explained by and referred to her adoption of the family in that sense.

On full consideration, I am satisfied that such conduct is far from bringing this case within the rule as to ademption or satisfaction of legacies, and that if we extend the rule to this case we cannot stop short of applying it to every case of gifts made after the will to one of a family selected as the residuary legatees of a testator. It may be further observed that the case of *Montefiore v. Guedalla* ⁽²⁾ was the first case in which the doctrine of ademption or satisfaction was applied to residuary legatees; and in the case of *Meinertzen v. Walters* ⁽³⁾ we came to the conclusion that it could only be applied between children against a child in favor of a child, not in favor of a stranger. It would, therefore, be necessary in this case to show, not only that the testatrix had placed herself *in loco parentis* to the defendant, but to his sister, of which there is no trace.

The result is that the Master of the Rolls' order, so far as regards the capital, must be discharged. The defendant is clearly liable to account for the dividends due in the testatrix's lifetime, and afterwards received by him. He swears, indeed, that it was intended that he should receive whatever was not received by her in her lifetime. It is impossible to

⁽¹⁾ 5 My. & Cr., 29.

⁽²⁾ 1 D., F. & J., 93.

⁽³⁾ Law Rep., 7 Ch., 670.

place any reliance on this. It was obviously the intent and meaning of the transactions in this case (as it may be taken to be universally in like gifts) that the donor should receive the income during her life, and the accident that a dividend was in arrear at her death could not make any difference as to the equitable right.

The decree of the Master of the Rolls, so far as regards the declaration as to the trust of the £7000, must be discharged.

SIR G. MELLISH, L.J.: I am entirely of the same opinion. 352] I should not have thought *it necessary to add anything to what has been said by the Lord Justice, with which I entirely agree, except that, on account of the great respect I have for the judgment of the Master of the Rolls, I wish to say something on the principle on which his honor decided this case.

There can be no doubt that the question in this case is a question of fact. It cannot be decided simply on the ground of legal presumption, because whatever effect is given to the evidence of Mr. Pascoe and his wife, their evidence is evidence to rebut the presumption, and therefore the court must consider whether the presumption is rebutted or not.

Now, the Master of the Rolls appears to have thought that because the presumption that it was a trust and not a gift must prevail if there were no evidence to rebut the presumption, therefore when there was evidence to rebut the presumption he ought not to consider the probability or improbability of the circumstances of the case, and whether the presumption was really true or not, but ought to decide the case on the ground that the evidence of Pascoe and his wife taken alone was not satisfactory. But, in my opinion, when there is once evidence to rebut the presumption, the court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law as to disregard the circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption.

Now, the presumption must, beyond all question, be of very different weight in different cases. In some cases it would be very strong indeed. If, for instance, a man invested a sum of stock in the name of himself and his solicitor, the inference would be very strong indeed that it was intended solely for the purpose of a trust, and the court would require very strong evidence on the part of the solicitor to prove that it was intended as a gift; and certainly his own evidence would not be sufficient. On the other hand, a man may make an investment of stock in the name of him-

self and some person, although not a child or wife, yet in such a position to him as to make it extremely probable that the investment was intended as a gift. In such a case, although the rule of law, if there was no evidence at all, would compel the *court to say that the presumption [353 of trust must prevail, even if the court might not believe that the fact was in accordance with the presumption, yet, if there is evidence to rebut the presumption, then, in my opinion, the court must go into the actual facts. And if we are to go into the actual facts, and look at the circumstances of this investment, it appears to me utterly impossible, as the Lord Justice has said, to come to any other conclusion than that the first investment was made for the purpose of gift and not for the purpose of trust. It was either for the purpose of trust or else for the purpose of gift; and therefore any evidence which shows it was not for the purpose of trust is evidence to show that it was for the purpose of gift. We find a lady of considerable fortune, having no nearer connections than Mr. Pascoe, who was then a young man living in her house, and for whom she was providing. We find her, manifestly out of her savings, buying a sum of £250 stock in the joint names of herself and him, and at the same time buying another sum of £250 stock, on the very same day, in the joint names of herself and a lady who was living with her as a companion. Then, applying one's common sense to that transaction, what inference is it possible to draw, except that the purchases were intended for the purpose of gifts? If they were intended for the purpose of trusts, what possible reason was there why the two sums were not invested in the same names? Besides, at the very same time the lady had a large sum of stock in her own name, and could anything be more absurd than to suppose that a lady with £4,000 or £5,000 in her own name at that time in the same stock, and having a sum of £500 to invest out of her savings, should go and invest £250 in the name of herself and a young gentleman who was living in her house, and another £250 in the name of herself and her companion, and yet intend the whole to be for herself? I cannot come to any other conclusion than that it must have been intended by way of a present after her death.

Then, when we have once arrived at the conclusion that the first investment was intended as a gift (and the second was exactly similar), and when we find that the account was opened for the purpose of gift, those facts appear to me to rebut the presumption altogether, because when an account is once found to be opened *for the purpose of gift [354

there is very strong reason to suppose that everything added to that account was intended for the purpose of gift also. Assuming the testatrix to know that she had made a gift, and had invested a sum of money in stock in the joint names of herself and Pascoe for the purpose of making a present to him, it would certainly be a very extraordinary thing that she should go and add other large sums to that account, not for the purpose of making a present to him, but for the purpose of his being a trustee. I cannot help coming to the conclusion that, as a matter of fact, these investments were intended for the purpose of gift.

There were one or two facts relied on against this conclusion. It was said that Mr. Pascoe kept the matter secret for a great number of years, and never revealed it. I do not greatly rely on that. Every one who has experience knows that some persons are very reticent about their affairs, and some persons are always talking about them. You cannot form any inference as to that. If he really and *bona fide* believed, and had no doubt that it was intended for a gift, and for his use, I do not see that there was anything extraordinary in his not mentioning it to the persons who now say it was not mentioned to them. The only fact that in the least degree, in my opinion, went against him was his not accounting for the dividend which was due at the death of the testatrix. I think it is not at all impossible that he might have honestly believed that that was his, although I entirely agree that in point of law it was not so; therefore on the whole I come to the same conclusion as the Lord Justice.

Solicitor for the plaintiffs: Mr. J. W. *Heritage*.

Solicitors for the defendants: Messrs. *Thompson & Groom*.

See notes 8 Eng. R., 718, note; 10 Eng. R., 799; *Edgerly v. Edgerly*, 113 Mass., 175.

[Law Reports, 10 Chancery Appeals, 355.]

LJJ., March 24, 1875.

355]

*GEARNS V. BAKER.

[1875 G. 38.]

Shooting—Cutting Timber—Injunction.

A landowner, who has demised for a term of years the right of shooting over his lands, is not thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting.

Order of Hall, V.C., reversed.

By an agreement, dated the 27th of October, 1874, the Rev. H. D. Baker, the defendant, as trustee under the will of E. D. Poore, Esq., agreed to let to John Gearn, Esq., the plaintiff, for twenty-one years, determinable at the end of the first seven or fourteen years, at the yearly rent of £125, a mansion-house in Wiltshire, called Syrencot, with the grounds and about seventeen acres of land, together with the exclusive right of shooting, coursing, and fishing over 1,300 acres more or less of land adjoining. The plaintiff alleged that he was induced to enter into this agreement on the faith of an inspection of the estate, and of its apparent capabilities for sporting purposes, particularly as comprising coppices, woods, plantations, and belts of trees. In November, 1874, the plaintiff saw persons marking trees for felling, and remonstrated with the defendant thereon. Since that time the defendant had advertised for cutting and sale 7,500 trees, including practically the whole which were standing in five of the plantations on the 1,300 acres, and the defendant proposed to allow the purchaser to fix and use a steam-engine and saw-mill, &c.; the conditions of sale of the timber stated also that some of the trees were to be grubbed up. The plaintiff alleged that the cutting the trees and grubbing would destroy the cover for game, and that the drawing the timber and putting up the saw-mill would interfere with and disturb the game.

The plaintiff filed a bill stating as above stated, and praying that the agreement to grant a lease might be specifically performed, and that the defendant might be restrained from cutting the timber.

*The plaintiff moved before the Vice-Chancellor [356 Hall for an injunction, adducing evidence of the facts above stated, and that the acts complained of would interfere with the shooting.

The defendant adduced evidence that the trees were in some places standing too close together, and in others injured the underwood; that he had in April, 1874, determined to have these trees cut, and that it was proper that they should be cut. The trees had been sold, and some had been cut before the motion was made.

The Vice-Chancellor Hall, on the 5th of March, granted an *ex parte* injunction, and on the 18th of March granted an injunction to restrain the cutting of the timber; either party to be at liberty to apply in chambers as to cutting down any trees not already felled.

The defendant, by way of appeal, moved to dissolve the injunction.

Mr. *Lindley*, Q.C., and Mr. *Shebbeare*, for the defendant: We do not propose to do anything except what is proper for the management of the estate. It is absurd to suppose that for about 1s. an acre we can have intended to part with the right of cutting trees or planting as we please. It is not pretended that we are acting wantonly or maliciously: *Jeffries v. Evans* (1) is exactly in point.

Mr. *W. Renshaw* (Mr. *Dickinson*, Q.C., with him), for the plaintiff: We took this shooting supposing that the land would be left as we found it, but if these woods are cut the covers will be destroyed. Besides, the hauling of the timber and the noise of the saw-mill will drive away the game. *Frogley v. Earl of Lovelace* (2) is an authority, and what the Master of the Rolls said in *Pattisson v. Gilford* (3) is a clear statement of our rights.

SIR W. M. JAMES, L.J.: I am of opinion that this injunction is unsustainable.

357] *The agreement is an ordinary agreement for letting shooting, and I must say that it would be an immense surprise to many persons who let shooting in this way to learn that they are to be interfered with by this court or by any other court in their mode of managing their own property. It is preposterous to suppose that a man who grants a shooting lease for twenty-one years is to be dictated to by this court as to whether he shall cut down a tree or remove a coppice, because by so doing he would be driving away the hares or interfering with the breeding of the pheasants. If men mean to acquire such rights, they must express their meaning clearly. I am of opinion that such rights are not expressed and not implied in the ordinary grant of shooting, and that this court has no right to interfere in the way suggested. As this case stands, it is the common case of a man who has granted the right of shooting, and is minded to deal with his estate as other landowners deal with their estates, and I am of opinion that there is no right or power in this court to interfere with him in so dealing.

The injunction must be dissolved, and the defendant will have his costs of the motion in the court below.

SIR G. MELLISH, L.J.: I am entirely of the same opinion. The question is purely legal, whether a landowner, by the mere granting under seal to another person the exclusive right of shooting, coursing, and fishing over 1,300 acres of land which still remain in his possession, is prevented from cutting his trees. I am of opinion that he is not, and that

(1) 19 C. B. (N.S.), 246.

(2) *Job.*, 333.

(3) *Law Rep.*, 18 Eq., 259.

on such a grant no action at law for simply cutting his trees would lie against him. There is evidence that the cutting of the trees will prejudice the shooting this year, and I have no doubt that it will do so; but there is no evidence that the landowner is not cutting the trees *bona fide*, and because the trees in the ordinary and proper course of management ought to be cut. There is a lease for twenty-one years, and there is evidence that the trees are in a state which require cutting; and is it to be said that the landowner, for the whole period of twenty-one years during which this lease is running, is to abstain from cutting the timber upon his estate merely because he has let the right of *shooting? In my opinion, the right of shooting is [358 a right to shoot over the lands as the lands may happen to be at the time, the landlord, of course, not doing anything for the express purpose of injuring the right of shooting. It is unnecessary to consider whether he could turn the covers into pasture or arable land, because he is not proposing to do anything of the kind. All he is proposing to do is to cut down trees, and next year he may propose to replant, which, I suppose, it would then be contended was again interfering with the right of shooting.

In my opinion, the landowner in this case is not prevented from managing his estate in the way he thinks best, and this injunction must be dissolved.

Solicitors: Mr. *E. M. Chubb*; Messrs. *Abbott, Jenkins & Abbott*.

[Law Reports, 10 Chancery Appeals, 358.]

L.JJ., April 19, 1875.

DIMOND V. BOSTOCK.

[1873 D. 26.]

Gift to a Class—Designatio Personarum—Persons excepted by Name—Nephews and Nieces of A. living at his Death.

A testatrix gave personal estate in trust for all the nephews and nieces of her late husband who were living at the time of his decease, except A. and B., as tenants in common. Two nephews, who would otherwise have taken under the bequest, died before the testatrix, one before and the other after the will:

Held (affirming the decision of Malins, V.C.), that the gift was to a class, and not to designated persons, and therefore that there was no lapse, but the fund was divisible among those of the class who survived the testatrix.

THIS was an appeal from a decision of Vice-Chancellor Malins.

Emma Bostock, the widow of Ellis Bostock, by her will

1875

Dimond v. Bostock.

LJJ.

dated the 2d of June, 1869, gave the residue of her personal estate to C. J. Dimond and B. J. Attenbury, whom she appointed her executors, upon trust to convert the same into money; and she declared the trusts of the proceeds in the following terms: "In trust for all the nephews and nieces in the first degree of relationship to my late husband Ellis Bostock, who were living at the time of his decease, excepting the said Evereld Catherine Rickards and James Bethune Bostock, in equal shares as tenants in common."

359] *The testatrix died in September, 1872. At the time of her husband's death there were nine nephews and nieces who answered the description in the will, besides the nephew and niece who were excepted. Of these one nephew died in 1868, before the date of Emma Bostock's will, whether with or without the knowledge of the testatrix did not appear, and another died in 1872, after the date of her will, but in her lifetime.

A suit having been instituted by the executors and trustees, a question arose as to the division of the residuary fund, the next of kin of the testatrix contending that it was divisible into ninths, and that the shares of the two nephews who had died lapsed. The Vice-Chancellor, however, decided that the gift was to the nephews and nieces as a class, that those only were included in the class who survived the testatrix, and that the fund was accordingly divisible into sevenths.

From this decision the next of kin appealed.

Mr. Glasse, Q. C., and Mr. Caldecott, for the appellants: We contend that the legatees in this case although described as a class, are in fact *personæ designatæ* as much as if they were mentioned by name. The persons were ascertained at the date of the will by the words "living at the time of his decease." If the court should hold that the two deceased persons were not included in the gift, it would strike those words out of the will. In *Viner v. Francis* (1), which was relied on by the other side, there were no such words. The gift was simply "to the children of my late sister." A distinctive characteristic of a class is that it is fluctuating, which is not the case with the legatees here. In *Leigh v. Leigh* (2), the Master of the Rolls said: "Where a legacy is given to a class of persons, that class is to be ascertained at the time of distribution." But here the persons were known at the time of the gift, and their number was incapable of increase or diminution. So in *Cruse v. Howell* (3), Vice-Chancellor Kindersley says: "If there is a bequest to cer-

(1) 2 Bro. C. C., 658.

(2) 17 Beav., 605, 607.

(3) 4 Drew., 215, 217.

tain persons *nominatim*, or so described as to be fixed at the time of the gift, so that there can be no fluctuation, then if one of them dies in the lifetime of the testator, his *share lapses." In *Havergal v. Harrison* ⁽¹⁾ a gift to [360 "my brothers and sister" was held a *designatio personarum*; and in *Hall v. Robertson* ⁽²⁾ a gift to "unmarried daughters" was held to designate those who were unmarried at the date of the will. It is true that Jarman, in his Treatise on Wills ⁽³⁾, says that a gift to children living at the death of A. is a gift to a class, but the authorities which he cites do not bear out his proposition. We have here the additional fact that the testatrix excepts by name a nephew and niece of her husband, showing that the others were referred to as a class merely to avoid the trouble of mentioning them all by name.

Mr. *J. Pearson*, Q.C., and Mr. *Woodroffe*, for the legatees, were not called on.

Mr. *Rawlinson* for the executors.

SIR W. M. JAMES, L.J.: I am of opinion that the construction which the Vice-Chancellor has put upon this will ought not to be disturbed. The rule of the courts with regard to lapse very often operates against the intention of a testator, and the court has made this modification of the rule, that where there is a gift to a class, the rule of lapse does not apply. In that case the fund is to be divided among the members of the class living at the period of distribution, unless the words describing the class are used for mere brevity, instead of designating the persons by name. If this had been the first occasion on which the point had arisen, there might have been good ground for contending that the legatees in such a gift as the present were *personæ designatæ*, just as if the testator had mentioned their names. But we have first the authority of *Viner v. Francis* ⁽⁴⁾, in which there was a gift to "the children of my late sister." It was impossible that there could be any fluctuation in that class; it was just the same as if it were a gift to the persons by name who answered that description. They were *personæ designatæ* quite as much as the members of the class in the present case. Then *there was [361 the case of *Lee v. Pain* ⁽⁵⁾, where the gift was "to the children of B. Moore who shall be living at the time of his decease." That was followed by *Leigh v. Leigh* ⁽⁶⁾, which appears to me undistinguishable from this case. There the

⁽¹⁾ 7 Beav., 49.

⁽²⁾ 4 D., M. & G., 781.

⁽³⁾ 3d ed., vol. ii., p. 142.

⁽⁴⁾ 2 Bro. C. C., 658.

⁽⁵⁾ 4 Hare, 201.

⁽⁶⁾ 17 Beav., 605.

1875

Reynard v. Arnold.

L.JJ.

gift was to "the present born children of H. Leigh." And yet in all these cases the rule as to treating the legatees as a class prevailed. There being these authorities, are we justified in overruling them, only in deference to the *dictum* of Vice-Chancellor Kindersley in *Cruse v. Howell* (¹), which is in favor of the contention of the appellants? The Vice-Chancellor there says: "If there is a bequest to certain persons *nominatim*, or so described as to be fixed at the time of the gift, so that there can be no fluctuation, then if one of them dies in the lifetime of the testator, his share lapses." But in laying down this canon of construction the Vice-Chancellor had no intention of overruling *Lee v. Pain* and *Leigh v. Leigh*, which he considered to be consistent with his decision. These cases are quite sufficient warrant for the decision of the Vice-Chancellor in the present case, and we ought not to reverse it.

SIR G. MELLISH, L.J.: I am of the same opinion. I think we ought not to reverse the rule on which the court has long acted in such cases. In the first place it is clear that the exception of two persons from the class can make no difference. It would be absurd to say that if there is a gift to all the children of A. except his eldest son, that is not a gift to a class. Then as to the argument that the persons are designated by the words "living at the time of his decease," I think that those words were only inserted to show that the class was not to be capable of increase. They are a description of the persons included in the class, who were to be all persons born in the lifetime of the husband, and not nephews and nieces born after his death. There is no reason why the ordinary rule should not apply in this case. Therefore the order of the Vice-Chancellor must be affirmed with costs.

Solicitor for the plaintiff: Mr. *C. B. Dimond*.

Solicitors for the defendants: Messrs. *Robinson & Preston*.

(¹) 4 Drew., 215.

[Law Reports, 10 Chancery Appeals, 386.]

March 22, 1875.

386]

*REYNARD V. ARNOLD.

[1874 R. 70.]

Landlord and Tenant—Fire Insurance—Option of Purchase.

Under the terms of a lease the tenant was bound to insure against fire, and had an option of purchasing the property. He insured in a sufficient sum. The premises were damaged by fire, and it then appeared that the landlord had a policy on the

premises in another office, of which the tenant had no notice. The two offices apportioned the amount of loss between the two policies, and the landlord received what was thus payable under the policy effected by him. The tenant shortly after the fire gave notice to exercise his option of purchase, and proposed that the insurance moneys under both policies should go in part payment of the purchase-money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and insisted on the money under the other policy being applied in reinstating the premises, and on the tenant declining to do this brought ejectment against him :

Held, that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in reinstating the property after the tenant had exercised his option of purchase.

THIS was a motion by way of appeal from an order of Vice-Chancellor Malins granting an injunction.

*By an indenture, dated the 11th of February, 1873 [387 the defendant Arnold demised a windmill, dwelling-house, buildings, and land to the plaintiff Reynard for seven years from Christmas, 1872, at a rent of £35, payable quarterly. The plaintiff covenanted to keep the mill and buildings insured against fire in £800, in the joint names of the plaintiff and defendant, and it was agreed that all moneys recovered under the insurance should be applied in reinstating the premises. The defendant covenanted with the plaintiff that if at any time during the term the plaintiff should be desirous of purchasing the premises at the sum of £800, and should before Christmas, 1879, give the defendant notice in writing of such desire, the plaintiff should be entitled to become the purchaser at that sum, and that upon payment on or before the 25th of December, 1879, of £800, together with all arrears of rent, insurance, and outgoings, or a due proportion thereof up to the time of payment of the purchase-money, the defendant would convey to the plaintiff.

The plaintiff insured the premises with the Alliance Office for £1,080.

The mill was destroyed by fire on the 27th December, 1873, and the plaintiff made a claim on the insurance office. He then for the first time discovered that the defendant held a policy of insurance on the property in his own name for £515 in the Guardian Office. The total damage was assessed at £600, and was apportioned between the two offices ; the Guardian paid the defendant on the 10th of March £220 4s., and the Alliance Office was ready to pay on its policy £379 16s.

On the 13th of March, 1874, the plaintiff gave the defendant notice of his desire to purchase, and suggested that the moneys received from the two insurance offices should be applied in part payment of the purchase-money.

The defendant's solicitor answered on the 18th of March,

1875

Reynard v. Arnold.

L.JJ.

taking no notice of the option to purchase, but requiring the plaintiff to employ the insurance money in reinstating the premises. Some further correspondence ensued, the defendant insisting that the money to be received from the Alliance Office should be applied in reinstating the premises, and threatening to bring ejectment and put in force the provisions of the Building Act (14 Geo. 3, c. 68, s. 83). On the 388] 28th of April the plaintiff's *solicitor wrote again, insisting on the right to purchase. The defendant's solicitor replied that the defendant would at once bring ejectment unless steps were taken to reinstate the premises; and he also sent a notice to the Alliance Office, requiring them to cause the insurance money to be applied in reinstating the premises. The plaintiff then filed his bill for specific performance, for a declaration that he was entitled to the money received from both offices, for an injunction to restrain the defendant from bringing ejectment, and (par. 4) for an injunction to restrain the defendant from requiring the sum receivable from the Alliance Office to be applied in reinstating the mill, or otherwise than according to the directions of the plaintiff, and from interfering to prevent the receipt thereof by the plaintiff. The defendant by his answer insisted on the right to retain the £220 4s. for his own benefit.

Vice-Chancellor Malins having granted an injunction according to the fourth paragraph of the prayer, the defendant appealed. The appeal motion came before the court on the 15th of March, and stood over to give the parties an opportunity of coming to some arrangement. None having been come to, it was agreed that the court should dispose of the suit as if it was at the hearing.

Mr. *Glasse*, Q.C., and Mr. *W. W. Cooper*, for the defendant.

Mr. *T. C. Wright* (Mr. *Higgins*, Q.C., with him), for the plaintiff, as to the time from which rent was to cease and interest to run, referred to *Weeding v. Weeding* (¹), *Day v. Weeding* (²), where it was held that interest instead of rent began to run from the rent-day last preceding the exercise of the option to purchase.

SIR W. M. JAMES, L.J.: I am of opinion that the plaintiff has been right throughout, and that the defendant must pay the costs of the suit. The plaintiff was a lessee with an option of purchase, and was under an obligation to insure against fire. He insured the property in a sufficient amount, a fire occurred, and the lessor having also insured

(¹) 7 J. & H., 424.

(²) Reg., Lib. A., 1857, f. 1697.

the property, the insurance effected by the lessee became to a great extent unproductive in consequence of the existence of *the other policy, of which he had no notice. The lessee then had a right to say that the lessor must account for what he received under that other policy, and having exercised his option of purchase, he had a right to say that the landlord must take the policy-money on account of the purchase-money. The litigation is owing to the landlord having insisted on retaining the proceeds of one policy for his own benefit, having insisted on the proceeds of the other being applied in reinstating the premises, notwithstanding the exercise of the option of purchase, and having brought ejectment; on all which points, in my opinion, he was in the wrong. According to the terms of the option of purchase the rent was to be paid up to the time of completion: so, allowing a reasonable time for completion, let the plaintiff pay rent to the 24th of June, 1874, and interest on the balance of the purchase-money from that day to completion. The defendant must pay the costs of the suit, except that there will be no costs of the motion before us.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Scott, Jarman & Co.*; Mr. *J. E. Wilson*.

[Law Reports, 10 Chancery Appeals, 389.]

L.JJ., April 20, 1875.

BEYNON V. COOK.

[1874 B. 39.]

Mortgage—Reversion—Expectant Heir—Reasonable Bargain.

A man twenty-six years of age, entitled to a reversion of £600, but wholly without present means, applied to a money lender, who advanced him £85 on a mortgage of the reversion for £100, with a provision that if default should be made in payment of the £100, the £100 should bear interest at 5 per cent. per month. Twelve years afterwards the reversion fell into possession, and on a bill filed by the personal representative of the mortgagor, a decree was made for redemption on payment of the sum borrowed and simple interest at 5 per cent.

Decree of the Master of the Rolls affirmed.

RHYS BEYNON, at the date of the transaction impeached by the bill, was twenty-six years of age, and had recently married. He was wholly without means, and not having been brought up to *any business or profession, was [390] unable to procure his livelihood, and was supported chiefly by his wife's relations. He had been entitled to a younger

son's portion of £600, charged on the family estate; but in the early part of the year 1860, on the occasion of the sale of the estate, he had released his portion, and had taken in lieu of it the bond of his elder brother for £600, payable on the death of his father, John Thomas Beynon, who was then fifty-four years of age, and in good health.

In July, 1861, Rhys Beynon was in great pecuniary distress, and applied to a friend named Whitmore, who had previously lent him small sums, to assist him in obtaining money. Whitmore introduced him to the defendant, a money-lender named Robert Cook. On the 16th of July, Cook advanced to Rhys Beynon the sum of £85 on his promissory note for £100, payable at six months' date. Payment of the £100 was collaterally secured by an indenture of mortgage of even date, whereby Rhys Beynon assigned the bond to Cook, and it was declared that Cook should stand possessed of the bond upon trust, in case default should be made in payment of the note on the 16th of January, 1862, to sell the bond, and out of the proceeds to retain his costs, charges, and expenses, and the sum of £100, with interest thereon from the 16th of January, 1862, at the rate of 5 per cent. per month.

Rhys Beynon continued in a state of pecuniary distress up to the time of his death. He died on the 26th of October, 1872, leaving his widow, the plaintiff, his legal personal representative.

John Thomas Beynon died on the 26th of October, 1873.

In December, 1873, the plaintiff offered to repay the money actually advanced by Cook, with compound interest at 5 per cent. to the date of the offer, but Cook refused to take less than £400, and after some further correspondence, which led to no result, the plaintiff filed her bill against Cook, praying that it might be declared that the promissory note and mortgage ought to stand as securities only for the money actually advanced to Rhys Beynon by the defendant, with such further sum by way of interest as the court might award; and for consequential relief.

Cook, by his answer, submitted that the terms on which he made the advance were not unconscionable, and stated, which was not denied, that for several years previously to 39[1] his death Rhys Beynon *was a clerk in the employment of the plaintiff's solicitor, during which period he never made any attempt to oppose the defendant's claim or made any complaint whatever against it.

The Master of the Rolls made a decree for redemption

on payment of the amount advanced and simple interest at 5 per cent. (1)

*The defendant appealed.

[392

(1) 1875. Feb. 15.

SIR G. JESSEL, M.R.: I am of opinion that Rhys Beynon was in that peculiar position of reversioner or remainderman which is oddly enough described as an expectant heir. This phrase is used, not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen, as appears from *Tottenham v. Emmet* (14 W. R. 3), and *Earl of Aylesford v. Morris* (Law Rep., 8 Ch. 484). So that the doctrine not only includes the class I have mentioned, who in some popular sense might be called expectant heirs, but also all remaindermen and reversioners.

Even if you limit the application of the doctrine to the class of persons who, in some popular sense, are expectant heirs, I hold that Rhys Beynon was one. His property consisted of this reversionary sum, and nothing else. He was in great distress, and a friend introduced him to Mr. Robert Cook, who took from this young man a promissory note for £100, for which he was charged £15 discount for six months, and a mortgage of his reversionary interest, whereby he covenanted, in case of the note not being paid (and everybody knew that it would not be paid) to pay interest at the rate of 5 per cent. per month until Cook was paid by the sale of the bond, or by the reversion falling into possession.

The point to be considered is, was this a hard bargain? The doctrine has nothing to do with fraud: *Bowes v. Hepas* (3 V. & B., 117). It has been laid down in case after case that the court, wherever there is a dealing of this kind, looks at the reasonableness

of the bargain, and if it is what is called a hard bargain, sets it aside. It was hardly argued with anything like force or effect on behalf of the defendant, that such terms could have been obtained from a man who was in a position to offer good security. It was not denied that the obligor was a person in good circumstances, and well able to pay the bond. It was not said, in fact it could not have been said, that the security was not worth more than £85. It was not said this was a bargain which a man who was not in great distress would have acceded to. It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many judges. Yet I have heard a very long argument on the subject. It was suggested that the abolition of the usury laws might have some effect on the case, but their abolition could have no effect upon the doctrine, because the doctrine was established at a time when the usury laws existed, and therefore could not have been applicable to a case tainted with usury. Then it was suggested that, because the usury laws had been repealed, a bargain that before was unreasonable became reasonable. Upon that *Croft v. Graham* (2 D. J. & S. 155) is conclusive, showing that the repeal of the usury laws does not make a hard bargain with an expectant heir reasonable, because in other cases the usury laws no longer being in force, persons may make hard bargains with persons entitled to property in possession, or entitled to no property at all.

I have disposed of the argument that Rhys Beynon was not an expectant heir. I think he was one in every sense of the word. He certainly was a person entitled to a reversion, and if he borrowed, he must have borrowed either on the reversion, or with a view to the reversion being a security. It has never been said a man can be relieved because he happens to be a reversioner, and the money-lender does not know it, but lends him money upon his promissory note at usurious interest. In order to be relieved, he must have been trusted upon the credit of

Mr. Brett (Mr. Karslake, Q.C., with him), for the appellant: The borrower was not a young man as in *Earl of 393*] *Aylesford v. Morris* (*). In *Webster v. Cook* (*) a similar dealing was supported. There is no suggestion of fraud or pressure.

his expectations: *Earl of Aylesford v. Morris*. In this case there is an actual mortgage; and it is not suggested that without the mortgage Mr. Cook would have made the advance. The credit went upon the faith of the expectation of the reversion. That is the element, as far as I can see, in all the authorities, and the older authorities are unaffected either by the repeal of the usury laws or by the Sales of Reversions Act (31 & 32 Vict. c. 4).

There appears to me to be no question here about that act. It was considered in *Earl of Aylesford v. Morris* to make no difference in the case of a loan, and I do not see how it could make any difference in the case of a loan. What was set aside in the old cases was the loan: *Barnardiston v. Lingood* (2 Atk. 133; Barn. Ch. R. 337); the doctrine being, that you must not lend on extravagant terms to reversioners or remaindermen, with a view to getting paid out of the reversion or the remainder; and therefore I say it is the transaction of the loan that is set aside. That part of it has nothing to do with the value of the property. You may not know the value of the expectation, or it may be utterly uncertain, as in *Earl of Chesterfield v. Janssen* (1 Wh. & T. L. C. (3d. ed.) 483), where nobody knew what the old Duchess of Marlborough would leave to Mr. Spencer, and therefore no one could tell the value of the expectation.

In many other cases, what is called the *spes successionis*, that is, expectant heirship, must depend upon the dealings by the ancestor with the property in his lifetime. Nothing can be more uncertain than these; and therefore the value of the security is not an element for consideration.

The Sales of Reversions Act (31 & 32 Vict. c. 4) was passed for the purpose of abolishing the equitable doctrine which sets aside the sale of a reversion simply on the ground that the sum paid was not, in the opinion of the judges, an adequate value for the thing sold. It was thought by the Legislature that

the doctrine rested upon no solid foundation, the value of a thing being what it would fetch. To that extent, no doubt, the law administered by courts of equity was interfered with, but, as I said before, the act seems to have no application to the present case, and even if it had not been so laid down in *Earl of Aylesford v. Morris*, I should hold that it has no such application.

One other defence is suggested, and that is, that the bill was filed too late, the transaction having taken place in July, 1861, and the suit not having been instituted until February, 1874. The nature of these cases is, that the distress continues while the interest is running. The object of the rule is to prevent the distress of the reversioner being taken advantage of, and to protect him, according to Mr. Swanston (2 Sw., 140, n.), "against the designs of that calculating rapacity which the law constantly discountenances, the distress frequently incident to the owners of profitable reversions, and the improvidence with which men are commonly disposed to sacrifice the future to the present." All these things remain as long as the reversion remains; that is, until it falls into possession there is a continuance of the state of distress and improvidence. In the present case, the reversioner died in the lifetime of his father, the tenant for life. If the objection of delay is available in these cases at all—and I should be the last judge to say that men shall not seek their legal remedies promptly—it cannot be made available until the death of the tenant for life. Now, in the present case, the tenant for life died in October, 1873, and the bill was filed in February, 1874, so that the objection of delay cannot possibly avail. I therefore make a decree for the delivery up of the securities on payment of the amount actually advanced, with simple interest at 5 per cent., and as more than that was offered to Mr. Cook before bill filed, I order him to pay the costs of the suit.

(*) Law Rep., 8 Ch., 484.

(*) Ibid., 2 Ch., 542.

Moreover, the lapse of time is conclusive, and must be taken as a confirmation by acquiescence.

Mr. *Swanston*, Q.C., and Mr. *Crossley*, for the plaintiff, were not called upon.

SIR W. M. JAMES, L.J.: This is a perfectly idle appeal. The appeal is dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitor for the plaintiff: Mr. *James Mason*.

Solicitor for the defendant: Mr. *Bebb*.

[Law Reports, 10 Chancery Appeals, 394.]

L.JJ., March 24; April 23, 1875.

*ASPDEN V. SEDDON.

[394

[1874 A. 2.]

Injunction—Minerals—Support to Buildings—Damages—Grant.

A piece of land on which a cotton mill was to be built was conveyed, the grantor reserving to himself a chief rent, and reserving all mines and minerals under the piece of land, and power to take the same at pleasure, making compensation for damages to be done to the cotton mill. The grantee covenanted to build and keep in repair the cotton mill:

Held, that the grantor would not be restrained from working and taking the minerals under the piece of land, though the buildings on the piece of land would necessarily be thereby injured.

Decree of the Master of the Rolls affirmed.

Caledonian Railway Company v. Sprot (1) distinguished.

By an indenture dated the 31st of December, 1861, one William Stott conveyed in fee to John Pilkington, as a trustee for the West Houghton Cotton Manufacturing Company, a piece of land at West Houghton, with its appurtenances, subject to the following reservation:

“Except and always reserved out of these presents, and the direction, appointment, grant, and conveyance hereby made, unto the said William Stott, his appointees, heirs, and assigns, all mines, veins, and seams of coal, cannel, and ironstone; and other mines and minerals, lying within or under the said piece of land hereby appointed, granted, and conveyed, or any part or parts thereof, respectively, with full liberty, power, and authority for the said William Stott, his appointees, heirs, and assigns, and his, their, or any of their lessees, agents, and workmen, and every or any other person or persons, by his, their or any of their order or permission, at any time or times, or from time to time, to search for, get, win, take, cart, and carry away the same,

(1) 2 Macq., 549.

1875

Aspden v. Seddon.

L.JJ.

and sell or convert to his or their own use the said excepted mines, veins, and seams of coal, cannel, ironstone, and other mines and minerals, or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes, but 395] *without entering upon the surface of the said premises, or any part thereof, so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties, or in consequence thereof."

The piece of land was also made subject to the payment to Stott and his heirs of a chief rent of £72 3s. 2d., which had since been redeemed. The indenture further contained a covenant by the company to build on the piece of land, and forever afterwards to maintain in good repair, a substantial building suitable for a cotton mill, and one or more messuages or dwelling-houses, and to furnish the said building with sufficient steam power, mill gearing, and machinery, and not to allow the piece of land to be used for any other purpose than that of a cotton mill. And the indenture contained, amongst many other covenants and provisions, a covenant by Stott, "that he, the said William Stott, his appointees, heirs, executors, administrators, or assigns, will from time to time, and at all times hereafter, make and pay full and reasonable compensation (the amount thereof to be determined, in case of difference, by two indifferent arbitrators, or their umpire, as in the ordinary case of settlement of disputes by arbitrators) for all damage, spoil, injury, or loss that shall or may from time to time be sustained by the owner, tenant, or occupier, or owners, tenants, or occupiers for the time being of the lands hereinbefore expressed to be hereby appointed and granted, or any part thereof, or of any erections or buildings for the time being thereupon, for or by reason, in respect, or in consequence of the searching for, getting, working, or carrying away any of the hereinbefore excepted mines, minerals, or substances lying within or under the same land, or any part thereof."

The mill was built on the piece of land, but was partly destroyed by fire in 1870. The company afterwards went into liquidation, and the plaintiff, H. Aspden, in 1871, bought from the liquidator the piece of land, and reinstated the cotton mill.

The minerals reserved by the conveyance had been bought by the defendants, J. Seddon and T. H. Seddon, and they had lately begun to work coal mines under or adjacent to the mill. These workings caused, as the plaintiffs alleged, sub-

sidences of the *soil, causing cracks in the wall of the [396 mill, and preventing the machinery from working properly; and, as the plaintiffs alleged, the mill might be stopped at any moment. The plaintiffs further alleged that it would take a large sum to repair the injury, and that the mill could never be restored to as good a state as it was, and that in such cases seven or eight years was the usual period allowed for subsidence. And the bill, which was filed by Aspden and his mortgagees, prayed for an account and payment of damages, and for an injunction to restrain the defendants from working any coals or minerals so as to cause an injury to the plaintiffs.

The defendants denied that the subsidences complained of were occasioned by the working of their pits, and also averred that, under the terms of the deed of 1861, they had a right to work the coal as they thought fit, on paying damages.

The Master of the Rolls was of opinion that by the deed of 1861 the parties had contemplated and contracted that the grantor might take the minerals, and might take them in such a manner as would cause injury to the surface, making compensation; and his honor dismissed the bill with costs (*).

(*) 1874. Nov. 16.

SIR G. JESSEL, M.R.: I must decide this case on my own view of the construction of the contract, for this I take to be the result of all the authorities cited to me. There is a rule of law which says, and reasonably says, that where a man grants to another a piece of land, reserving either the whole or a portion of the subsoil below a given depth, or the whole, or a particular portion of one kind of subsoil or minerals, there is a presumption of law that the grantee of the land is to keep it, and that the grantor is not by any act of his to cause the surface of the land to subside, as it is called, that is, to crack, break up, or be otherwise injured, in such a way as that the grantee cannot reasonably use it. That is clear from the nature of the thing granted. It is also said that the presumption is of such a character as that it is to influence the court in construing the instrument of grant to this extent, that *prima facie* the parties must be taken to intend the thing granted to be enjoyed as granted, that is, the surface is to be enjoyed without its being liable

to be disturbed. All that seems to me to be perfectly reasonable and perfectly beyond controversy.

Then it is also conceded, and, as I read the authorities, clearly established, that the parties may, in granting a piece of land, agree to reserve the minerals to the grantor, and to allow him so to work them as to damage the surface of the land granted. It is a pure question of what the contract is, and if there is such a contract it is not repugnant to any rule of law. The question as to the existence of such a contract is a little influenced by the circumstance whether compensation is or is not to be made to the grantee, and of course it is more reasonable to suppose that the parties entered into such a contract if you find that compensation is to be given to the grantee than where no such compensation is given; and accordingly, on looking at the cases, you will find that where there is no compensation, the court has thought that to be a sort of additional presumption in favor of the grantee. That is not a presumption *de jure*, but only that sort of consideration which influences the

397] *The plaintiffs appealed.

Mr. *Manisty*, Q.C., Mr. *Fry*, Q.C., and Mr. *Finch*, for the plaintiffs: According to this decision the defendants

court in construing a difficult or an ambiguous instrument, namely, that what is reasonable is likely to have been the intention of the parties; and that again brings us back to the cardinal question of what is the construction of the contract?

Now, I will consider this contract first, independently of the cases, and I will then go through the cases to show, as I think I can show, that they do not interfere with the ordinary rules of construction beyond the presumption of law which I have mentioned, namely, that the thing granted is to be enjoyed as granted.

[His honor then stated and commented on the terms of the deed, coming to the conclusion that both parties assumed that the grantor might carry on underground workings which might seriously injure the buildings to be erected, the grantee being compensated by damages. His honor then continued:] That being my view of the contract between the parties, it follows that the plaintiff, being entitled to damages only, has no right to come into equity to get these damages. The right course, therefore, would be to dismiss the bill without prejudice to any action for damages, because there would be no equity then remaining in the bill. But as the bill claims damages, it would be right to put words into the decree, so as not to exclude the claim for damages.

The other point which I have to consider is, whether I am precluded by authority from so deciding? It appears to me that although the tendency of the authorities in time past went certainly to the extent of supposing it to be unlawful to contract that the surface might be let down, yet the modern authorities, when carefully examined, are all one way, and will be found to make the question depend on the construction of the deeds.

The first case cited was *Harris v. Ryding* (5 M. & W., 60), in which certain words in a document had to be construed. No judge objects more than I do to referring to authorities merely for the purpose of ascertaining the con-

struction of a document; that is to say, I think it is the duty of a judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another judge upon an instrument, perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument, and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction, you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever; and the result especially in some cases of wills, has been remarkable. There is, first, document A., and a judge formed an opinion as to its construction. Then came document B., and some other judge has said that it differs very little from document A.—not sufficiently to alter the construction—therefore he construes it in the same way. Then comes document C., and the judge there compares it with document B., and says it differs very little, and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has by this process come to be construed in the same manner.

I will, therefore, say nothing as to what the document was in *Harris v. Ryding*. But the ground of the decision was, that there being a presumption that the lessee was to have a sufficient support, there was nothing in that instrument which, in the opinion

may utterly destroy *the mill, but that cannot be in- [398
ferred from a mere provision for payment of damages:
Harris v. Ryding ('). A grantor cannot do anything

of the judges, showed an intention that the lessor could interfere with that support.

The next case cited was *Smart v. Morton* (5 E. & B., 30). There, no doubt, the words were stronger in favor of the right to destroy or let down the surface; and it does appear to me, speaking with the greatest respect for so great a judge as Lord Campbell, that he should not have looked at the grant in *Harris v. Ryding* in the way he did. He says: "We have compared it with the deed in *Harris v. Ryding*, as set out in the report of the case, and with a full copy of that deed which has been furnished to us; and for this purpose we can discover no substantial difference between them." It appears to me that the learned judge did not there take the right course, which was to construe the deed first, and look at *Harris v. Ryding* afterwards, and not look at the deed in *Harris v. Ryding* with a view to construe the deed before him. But, however that may be, Lord Campbell clearly puts it throughout that the grantee may renounce, and that it is a question of construction, and nothing else.

The next case which was referred to was the case of *Hext v. Gill* (Law Rep., 7 Ch., 699), in which case there was no right to compensation reserved. That, no doubt, had some little bearing on the decision, and it was also a case in which there were none of the peculiarities to which I have referred. It was also a question of construction upon which the court above took a different view from that taken by the court below. But Sir G. Mellish felt no difficulty on the subject, and said that if the owner sells the surface and reserves the minerals with power to get them, he ought, if he intends to have the power of destroying the surface in getting them, to frame his power in such language that the court may be able to say that such was clearly the intention of the parties; and the Court of Appeal, differing from the Vice-Chancellor, was of opinion that the grantor had not done so.

The next case cited was *Duke of Buccleuch v. Wakefield* (Law Rep., 4 H. L., 377), the decision of which Lord Hatherley puts most clearly on a question of the construction of a particular clause of a particular act of Parliament, having reference, no doubt, to the existing state of things at the time when the act passed.

The next case is the case of *Smith v. Darby* (Law Rep., 7 Q. B., 716). That was the case of a mining lease, and it has been said that a mining lease is a little more favorable for the lessee than a grant. That may be so, but it can make very slight difference if the wording is clear. That case, although a case of construction, has a considerable bearing on the present, and the reason is this: It was there again put by the judges simply as a question of construction, but still the *ratio decidendi* was this, that if you find that the exact sort of damage was contemplated by the parties, and that compensation was agreed to be given for it, you must imply the right to do the thing, the power of doing which must have been contemplated in order to cause damage to be contemplated.

The last case which I was referred to was *Eaton v. Jeffcock* (Law Rep., 7 Ex., 379). That was, again, a case of a mining lease, and the only importance of the case is that it shows what is the rule laid down by the court for ascertaining the rights of the parties. In all these cases the contract would regulate the obligations and the rights of the parties; but when the contract is ambiguous, there is a presumption of law that the surface is not to be interfered with, and that would turn the scale in the favor of the grantee of the surface. But being of opinion (to use the words of Baron Cleasby in that case) that, on a fair construing of the contract, having regard to the subject-matter, and having regard to the state of matters at the time when it was entered into, and of course giving to technical words their technical meaning—I say, construing the contract fairly, according to the rules of law—it is plain that the

(') 5 M. & W., 60.

repugnant to his grant, and destroy the thing granted. 399] *That the intention was not to allow the destruction of the mill is clear from the covenants to keep the mill in repair. The grantor cannot render it impossible for the 400] grantee to comply with the *covenants imposed on him. The presumption is in favor of right to support: *Dugdale v. Robertson* (*).

The case of *Caledonian Railway Company v. Sprot* (*) is very similar. We say that the owner of the mines may do some incidental damage, but may not deliberately destroy the mill. A provision for compensation does not make an illegal act legal: *Roberts v. Haines* (*); *Hext v. Gill* (*). *Rowbotham v. Wilson* (*) was different.

[They also referred to *Eadon v. Jeffcock* (*), *Smith v. Darby* (*), and *Duke of Buccleugh v. Wakefield* (*).]

Mr. *Herschell*, Q.C., and Mr. *A. Brown* (Mr. *Chitty*, Q.C., with them), for the respondents: It is clear that the intention of the parties was that the owner of the mines was not to be interfered with in working them, and was only to be liable in damages: *Buchanan v. Andrew* (*). As to the covenant to repair, it is clear that either we could not enforce it, or else we should have to pay with one hand what we received with the other. Under this deed we may dig the coal and do damage, not as doing wrong, but as our right. It is impossible to distinguish between proper working and improper working. How can a miner tell when he is taking coal which will do damage, and when he is taking it when it will not do damage? Such a contract is legal; and if these words have not this effect, no words can have it. The grantor is not derogating from his grant, but is keeping within it.

Mr. *Manisty*, in reply: Unless all right to support is expressly given up, it must remain; and such a giving up will not be implied. The meaning is, that the right to support is not given up; but that if in taking the coal and leaving

parties here did intend and contemplate that the grantor, who was entitled to take the minerals, should also be entitled to take them in such a manner as to cause injury to the surface, he making compensation. The court must give effect to the contract between the parties, and, having arrived at that conclusion from the construction of the instrument, the court is not compelled by any rule or presumption of law to say that the parties may not so contract.

That being my view of the case, the bill must be dismissed, and, of course, with costs, but without prejudice to any action at law.

(1) 3 K. & J., 695.

(2) 2 Macq., 449.

(3) 6 E. & B., 643.

(4) Law Rep., 7 Ch., 699.

(5) 8 H. L. C., 348.

(6) Law Rep., 7 Ex., 379.

(7) Ibid., 7 Q. B., 716.

(8) Ibid., 4 H. L., 377.

(9) Law Rep., 2 H. L., Sc. 236.

supports some damage is done, it must be paid for. The provision as to compensation is not privative but cumulative.

*April 23. SIR G. MELLISH, L.J., now delivered the [401 judgment of the court :

This is an appeal from a decree of the Master of the Rolls, by which he held that the plaintiffs were not entitled to the relief claimed by their bill. The sole question to be determined is, whether the plaintiffs, as the owners of a certain cotton mill and other premises situate at West Houghton, in the county of Lancaster, are entitled to have their cotton mill and other premises supported by the subjacent and adjacent minerals of the defendants, so as to entitle the plaintiffs to an injunction to restrain the defendants from getting their minerals in such a manner as to cause an injury to the plaintiffs.

The question entirely depends upon the proper construction to be put upon an indenture of the 31st of December, 1861, by which the premises now belonging to the plaintiffs were conveyed by the defendants' predecessors in title to the plaintiffs' predecessors in title, with a reservation of the minerals underneath. The material parts of the deed are these: [His Lordship then stated them.]

Now, it is clear that as the land was conveyed by Stott to the trustee for the West Houghton Cotton Manufacturing Company for the express purpose that a cotton mill and other buildings might be erected on it, and forever thereafter be kept in repair, as a security for the rent-charge reserved thereout, there was *prima facie* the grant of a right to have not only the surface of the land in its natural state, but the buildings to be erected supported by the subjacent and adjacent minerals then belonging to Stott, and reserved to him by the deed. The case of *Caledonian Railway Company v. Sprott* (*) is a direct authority to this extent. Still it is equally clear that this *prima facie* inference may be rebutted, and that if it appears from any express words in the deed, or by necessary intendment from anything contained in the deed, that it was not the intention of the parties that there should be any right to support, the court is bound to hold that the plaintiffs have failed to make out their case.

As laid down by Lord Wensleydale in *Rowbotham v. Wilson* (†) the rights of the grantor in the minerals must depend upon the *terms of the deed by which they are [402 reserved when the surface is conveyed. Now, by the deed,

(*) 2 Mueq., 449.

(†) 8 H. L. C., 348.

all mines and seams of coal, ironstone, and other minerals reserved to Stott, with full liberty, power, and authority for Stott and his lessees "to search for, get, win, take, cart and carry away the same, and sell or convert to his or their own use the said excepted mines, veins or seams of coal, cannel, and ironstone and other mines and minerals, or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes." These words do certainly appear in very plain terms to give power to the mineral owner to remove any part of the mineral at his pleasure; but, nevertheless, we think that we are bound by the authorities to hold that these words are not by themselves sufficient to take away the surface-owner's right to support. If the sentence had stopped there, these words would be consistent with the construction that the mineral owner may take away every part of the minerals, provided he can do so without violating the surface-owner's right to support, but not otherwise, and some further words would be necessary to prove that the intention of the parties was that the mineral owner should be at liberty to take away the whole or any part of the minerals, notwithstanding he might thereby let down the surface or any buildings thereon. Accordingly the respondents rely on the words which immediately follow in the deed as sufficient for this purpose. Those words are, "but without entering upon the surface of the said premises, or any part thereof, so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof."

As by the express words of the reservation the mine-owner in working the mines is not to enter upon the plot of land conveyed by the deed, the damage to the buildings for which compensation is to be given must be damage to the buildings caused by the removal of the minerals reserved, and therefore it follows that a right to remove all the minerals, notwithstanding the buildings above might be thereby damaged, was one of the liberties reserved by the deed. In substance, the plain meaning of the whole reservation seems to us [403] to be that the mine-owner is to be at liberty to *remove the whole or any part of the minerals at his pleasure, paying compensation to the surface-owner for any damage which may be thereby occasioned to the buildings of the surface owner, which is equivalent to saying that he may remove the whole of the minerals, notwithstanding the buildings may be thereby damaged, subject to a liability to pay com-

pensation. We do not think there is any other clause in the deed which really affects the question.

It was argued on the part of the appellants, that the right to compensation was merely an additional remedy given to the surface-owner in case his buildings were damaged, but did not give the mine-owner a right to get the minerals in such a way as to cause damage to the buildings. It seems to us, however, clear that the compensation is given for damage caused by rightful acts which the deed makes lawful, and not for damage caused by wrongful acts. The exercise of any of the excepted liberties must surely apply to rightful acts, and not to wrongful acts, because it is absurd to suppose that a liberty is reserved to do wrongful acts. If liberty is reserved to do the act complained of, that reservation, as between the parties and those claiming under them, makes the act rightful.

Then it was suggested that the compensation was intended to apply to any small damage which might accidentally and against the will of the mine-owner be occasioned to the buildings, but that he was not justified in removing the minerals in a way which he must know would occasion damage to the buildings. We think it is impossible to make any such distinction. If the plaintiffs have a right to have their buildings supported by the minerals underneath, and the buildings are damaged by the removal of the minerals, the right of the plaintiffs is equally violated, whether the defendants did or did not know that the removal of the minerals would damage the buildings. On the other hand, if the plaintiffs have no right to support for their buildings as against the defendants, the defendants are entitled to remove the whole of the minerals, although they know that the buildings of the plaintiffs will necessarily be thereby damaged.

We do not think it necessary to go minutely through the authorities, as the rule of law on the subject has been perfectly *settled since the decision of the House of Lords in [404 *Rowbotham v. Wilson* ('). It was said, however, that the case of *Caledonian Railway Company v. Sprot* (') was a direct decision in the House of Lords in favor of the plaintiffs. In that case, however, there was no clause in the conveyance similar to the clause before us, giving compensation to the railway company for any damage which might be occasioned to the railway company by the exercise of the liberties reserved, and there was nothing in the conveyance to rebut the presumption of a grant of a right of support to the railway. It is true that there was—

(') 8 H. L. C., 348.

(') 2 Macq., 449.

not in the conveyance, but in the act of Parliament relating to the railway company—a provision that the mineral-owners should not take away the minerals without giving to the company security for damage. But the House of Lords might well think that this clause in the act was inserted for the purpose of giving an additional security to the railway company, because it was obvious that it did not mean that the mine-owner in getting the minerals was to be at liberty to damage the railway and stop the traffic, but that before he got the minerals he should give security that he would not do so. The construction put by the House of Lords on this clause is no authority as to the construction of the deed before us. On the other hand, we agree with the Master of the Rolls that the case of *Smith v. Darby* (1) is a strong authority in favor of the defendants.

On the whole, we are of opinion that the decision of the Master of the Rolls must be affirmed, and the appeal dismissed with costs.

Solicitors for the plaintiffs : Messrs. *Norris, Allens & Carter*, agents for Messrs. *Darlington & Son*, Wigan.

Solicitors for the defendants : Messrs. *Sharp, Parkers & Co.*, agents for Mr. *T. F. Taylor*, Wigan.

(1) Law Rep., 7 Q. B., 716.

[Law Reports, 10 Chancery Appeals, 405.]

L.JJ., April 22, 29, 1875.

405] *Ex parte LAMBTON. In re LINDSAY.*

Bill of Exchange—Insolvency of Drawer and Acceptor—Doctrine of Ex parte Waring—Shipbuilding Contract—Bills given to pay Instalments of Purchase-money—Vendor's Lien for unpaid Purchase-money.

A contract for the building of a ship provided that the purchase-money was to be paid by instalments, partly in cash and partly by means of bills of exchange, to be paid and given at specified stages of the progress of the construction, the balance being paid on completion by a bill. The ship was from the time of paying or giving the first instalment to be the absolute property of the purchaser to the extent of his advances, subject nevertheless to the builder's lien for any unpaid instalments. Any bills given during construction were to be retired by the purchaser at completion and transfer. As the construction of the ship went on, the vendor drew bills upon the purchaser, which he accepted, for the instalments of purchase-money. After these bills had been negotiated, but before any of them became due, the purchaser took proceedings for liquidation, including his liability on the bills among his debts, and his creditors passed a resolution to accept a composition. The bill-holders refused to accept the amount of composition when tendered. The purchaser shortly after the resolution gave notice to the vendor to rescind the contract. Not long after this the vendor became bankrupt, and the ship was completed by his trustee. The bill-holders having claimed a lien on the ship :

Held (affirming the decision of the Chief Judge, reversing that of the County Court Judge), that the principle of *Ex parte Waring* ⁽¹⁾ was not applicable, and that the bill-holders had no lien on the ship.

THIS was an appeal from a decision of the Chief Judge, reversing a decision of the Judge of the Newcastle-upon-Tyne County Court.

Edward Lindsay was an iron shipbuilder at Newcastle. On the 20th of October, 1873, he entered into a contract with R. J. Marshall and D. T. Osborne, who were in partnership as engineers at South Shields, to build an iron screw-steamer for them. This contract contained the following clauses :

(1.) The ship was to be built according to a specification signed by both parties.

(2.) Fixed the dimensions.

(3.) "That if at any time the said E. Lindsay shall neglect or make default in any of the conditions of this contract, or in the event of the death, bankruptcy or insolvency of the said *E. Lindsay, or if not completed by the time [406 specified, it shall be lawful then and thenceforth for the said Marshall, Osborne & Co., to cause any person or persons nominated for that purpose by them to enter upon and take possession of the said vessel, and of all materials, matters or things prepared or provided, or in the course of preparation, for the said vessel, and to cause the said vessel to be completed by any person whom the said Marshall, Osborne & Co. may see fit to employ in such completion, and at such place or places as the said Marshall, Osborne & Co. shall choose to take the vessel to for that purpose, or in like manner to contract with some such person or persons for the completion of the work agreed to be done by the said E. Lindsay, and to employ such materials of and belonging to the said E. Lindsay as shall then be upon his premises, and which shall be considered fit and applicable for the purpose. And it shall be lawful for the said Marshall, Osborne & Co. to pay such person or persons such sum or sums as they shall think fit or agree upon in that behalf, and it shall be lawful for the said Marshall, Osborne & Co. to deduct such sum or sums of money as they may so pay from and out of the payments agreed by them to be made to the said E. Lindsay. And it is hereby further agreed that in the event of the amount of such payments exceeding in the aggregate the amount of the contract price agreed to be paid to the said E. Lindsay, the said E. Lindsay shall, on demand, pay such excess to the said Marshall, Osborne & Co., their heirs, executors, administrators or assigns."

(1) 19 Ves., 345.

(4.) "That the said vessel and the materials prepared or provided, or in course of preparation, for the same, shall from the time of giving or paying the first instalment by the said Marshall, Osborne & Co. to the said E. Lindsay, belong and are to be and shall be deemed, in every respect and for every and all purposes, to be the property of the said Marshall, Osborne & Co. to the extent of their advances (whether in the builder's yard, or in the river, or in the graving dock after launching), and that, for the better identification of the said vessel, and for the protection of the said Marshall, Osborne & Co., the said E. Lindsay shall, immediately the keel of the said vessel is laid, mark thereon the initials of the said 407] Marshall, Osborne & Co., as owners, and the *name of the said vessel, and as soon as practicable mark the name of the said vessel and the initials of the said Marshall, Osborne & Co., as owners thereof, in legible characters, subject nevertheless to the builder's lien for any unpaid instalments."

(5.) "The price of the said vessel shall be £7,600."

(6.) "The said vessel shall be launched on or before the 1st of August, 1874, and delivered to the purchasers, complete in hull and everything named in the specification, by the 1st of September, 1874, one day additional being allowed for every day Marshall, Osborne & Co. keep the vessel at their works solely for their own use in putting in machinery, &c., and if not so completed by the said E. Lindsay on the 1st of September, then the said E. Lindsay shall, on demand, pay to the said Marshall, Osborne & Co. £10 per week for every week beyond that date, or Marshall, Osborne & Co. may, if they prefer it, deduct same off contract price."

And in consideration of these provisions Marshall, Osborne & Co. agreed with Lindsay to pay for the vessel as follows:

"When keel is laid £100 cash, and £500 by 6 months' bill.

" framed £1000 " 6 "

" plated £200 cash, and £2000 " 4 "

" launched £200 " £2000 " 4 "

" finished Balance by 6 months' bill."

"All bills given during construction to be retired by Marshall, Osborne & Co. at completion and transfer."

The construction of the vessel was commenced and proceeded with by Lindsay. On the 9th of February, 1874, he drew upon Marshall, Osborne & Co. two six months' bills for £200 and £300 respectively, which were expressed to be "value received at keel being laid for steamer." On the 1st of June, 1874, Lindsay drew two six months' bills on Marshall, Osborne & Co. for £500 each, which were expressed to be "value received in iron screw-steamer now building."

On the 9th of July, 1874, Lindsay drew two four months' bills on Marshall, Osborne & Co. for £1,000 and £500 respectively, which were expressed to be "value received in iron screw-steamer now building." £100 was paid by Marshall, Osborne & Co. to Lindsay on the 12th of *February, [408 1874, upon the keel of the vessel being laid, but this was the only cash payment made. All the bills were accepted by Marshall, Osborne & Co., and all of them (except the bill for £300), were discounted by Lindsay with Messrs. Lambton & Co., bankers at Newcastle. On the 28th of July, 1874, Osborne died. The affairs of his firm were found to be embarrassed, and on the 31st of July Marshall filed a liquidation petition. His creditors, at their first meeting, resolved to accept a composition of 5s. in the pound, and this resolution was confirmed at the second meeting on the 18th of September. The liability in respect of the above bills of exchange was included in Marshall's statement, and the composition in respect of them was tendered to the bankers, but was refused by them. Marshall, on the 10th of October, 1874, gave notice to Lindsay of his intention to abandon the contract. The value of iron steamers had materially decreased since the agreement. On the 14th of August, 1874, Lindsay summoned a meeting of his creditors by a circular, in which he stated that he was unable to meet his engagements. This meeting was held on the 19th of August, but no arrangement was come to, and on the 20th of August a bankruptcy petition was presented against Lindsay by a creditor named Procter. On the 7th of September Lindsay was adjudicated a bankrupt. This adjudication was annulled by the Chief Judge on the 10th of November, and the proceedings under that petition were dropped. On the 18th of November Lindsay filed a liquidation petition, and he was ultimately adjudicated a bankrupt on the 11th of December upon a petition presented by another creditor. From the 20th of August Joseph Greener had been in possession of Lindsay's estate, first as receiver and manager, and then as trustee under the first petition, and afterwards in the same characters under the liquidation petition, and the second bankruptcy petition. Greener was appointed trustee under the second bankruptcy petition on the 29th of December. At the time of the presentation of the first petition the vessel was lying in Lindsay's yard unfinished, and Greener, as receiver and manager, completed her ready for launching, and expended for this purpose £1,067.

The bills having been dishonored at maturity, the bankers claimed to be entitled to a lien on the vessel for the

1875

Ex parte Lambton. In re Lindsay.

L.JJ.

409] amount they *had paid thereon, and they applied to the County Court to enforce this claim. The judge decided in favor of the claim, and ordered the trustee to sell the ship and to apply the proceeds of sale in paying, first his costs of the sale, next his advances to complete the ship, and then the sum due to the bankers in respect of the bills, with interest. Lindsay's trustee appealed, and the Chief Judge reversed the decision (').

(') Mar. 1, 1875.

SIR JAMES BACON, C.J.: After the very long argument I have heard it is satisfactory to be able to bring the case back to a very simple shape. Lindsay agreed to build a ship for Marshall, Osborne & Co. for £7,600. If he builds the ship they are to pay him £7,600, and if they do not pay him £7,600 the ship must remain his. That £7,600 has not been paid. Then on what ground could any one but Lindsay claim to have any interest in the ship? It is one entire contract, and the substance of it is that which I have stated. The ship is, of course, proceeded with progressively. There is a stipulation for payment by way of advances as the ship proceeds. There is a stipulation that, to the extent of these advances, the purchasers shall have a property in the ship, but all that is overridden by this general universal stipulation: "Until you pay me £7,600 the ship is not to be yours, nor any interest in it." The purchasers can claim nothing. Now it seems to me that this disposes of the question altogether, because unless that state of facts can be shaken *Ex parte Waring* (19 Ves., 345) cannot be resorted to, and no other principles of law need be resorted to. Lindsay is to build the ship, and as in the course of building expenses are incurred by him from day to day as the ship proceeds, advances are to be made to him by the purchasers. The agreement is so plain and so clear that it is impossible to have any doubt whatever on the subject. The 4th clause—that on which the learned judge of the court below most relied—has furnished to a great degree the argument on the part of the respondents. [His lordship referred to it.] There is also a stipulation as to the time within which the ship is to be completed, and the periods at which bills are to be given as the ship proceeds. And there is this ex-

press agreement—that all the bills given during the construction of the vessel are to be retired by Marshall, Osborne & Co. at completion and transfer; so that, although bills were given before the completion, when the ship was completed, and when its delivery was asked for by the purchasers, the whole sum must have been paid to Lindsay. That is of the very essence of the contract. Then what takes place is this: £100 is paid in cash, and at certain periods bills of exchange are given for other sums. These bills are discounted by the bankers in the most ordinary course of trade; no suggestion, no stipulation that the bills were on the security of the ship (although they do on their face mention the ship then building), but without the remotest intention on the part of anybody (discount, drawer, or acceptor) that there should be any connection between the moneys advanced on the bills and the ship in course of building. It has been suggested, on the authority of *Ex parte Waring*, that the holders of these bills are entitled to a lien on the ship. On what part of the ship I ask? Because it goes only to the extent of the purchasers' advances. That is clear from the contract. On what part of the ship, then, are they entitled to a lien? The ship is, as one entire substantive thing, to be subject to the builder's lien, notwithstanding that it is to belong to the purchasers to the extent of their advances. It is the property of the builder until he is paid. The bankers, on the authority of *Ex parte Waring*, as they say, contend that, inasmuch as there has been a double insolvency, and as there is a right of double proof upon these bills, they are entitled to apply the principle of *Ex parte Waring*. In my opinion, nothing can be more foreign to the principle of *Ex parte Waring* than the case now before me. *Ex parte Waring* proceeds, not upon any

*Mr. De Gez, Q.C., and Mr. Doria, for the appellant: The doctrine of *Ex parte Waring* (1) applies. Had

favor to the bill-holders, but upon the equitable rights subsisting between the parties to the bills. The holders are disregarded for all purposes of legal claims, but in order, as Lord Eldon said, and that is the very marrow and point of his decision, in order to work out the equity between the persons liable on the bills in a matter in which they are both interested, but in which neither of them can claim the property, it must be realized for the benefit of the holders to whom both are under an obligation to pay a share. There the equity is clear, and if there is any balance it is to be proved for in the ordinary way by the bill-holders. What has that to do with this case? What equity subsists here? There are no equities, no legal rights, that the purchaser of the ship can claim until he has paid £7,600. What can he do, although there is this stipulation in the 4th clause of the agreement? Can he sell any part of the ship thus said to belong to him? Could he interfere with what any assignee or contractor might do for the completion of the ship? The object and intention of that clause is perfectly obvious. It is to prevent the operation of the doctrine of order and disposition, and it is not unfrequent for such a stipulation to be made. It can, however, have no force with respect to the completion of the ship. As to the double insolvency, I quite agree that it is possible, as has been suggested to me, that assignees might lay their heads together and practise a fraud on persons holding bills. I have not the least reason to suppose that any such thing has been done here, and I find nothing whatever resembling it. What is the state of circumstances? Mr. Marshall becomes insolvent. He is unable to pay his debts, and he summons his creditors together, and they agree to take 5s. in the pound. The bill-holders are bound by that agreement to the extent of Marshall's debt, and his liability on the bills. What is his position? Here is a ship in course of building in respect of which a small part, less than one-half, of the agreement price has been paid. All that he could by any possibility do was to pay the difference, and insist on the ship being completed for

him. But he had not the means of completing the ship by paying the difference between the sums advanced by him and the value of the ship. To relieve himself of the burden of this contract he gives notice to the builders that he abandons the contract. He was free by means of the composition resolutions, and he declines to have any responsibility whatever. Suppose it had been otherwise, and that his right and his interest in the contract, which, vested in him by the composition, had been sold by him, could it be said that the bankers, who had stipulated for nothing, and who knew of nothing with regard to the ship—for so I must take it to be—had a lien on it? In my opinion, *Ex parte Waring* has nothing whatever to do with this case. *Ex parte Waring* contains law which has never been questioned; it has been very often misunderstood I agree, but the principle of it has never been questioned. It has no sort of application to this case, and if it had, it would be directly in favor of the appellant, because the equitable and legal rights arising out of the contract could not be arranged on any other terms than the parties resolve. I decline to bind myself by any opinion now as to what device may be resorted to, and with what success, with regard to *Ex parte Waring*. But in this case I find it clear and distinct that, after Marshall's insolvency, and when he abandoned the contract, the trustee in the bankruptcy of Lindsay, acting in the discharge of his simple duty, furnished money to complete the ship, and the ship being completed, it is a part of Lindsay's estate, not to be affected by any transaction arising out of the bills, and not to be affected by the principles of *Ex parte Waring*. But by reason of the original contract, if that had stood alone, and by reason further of the conduct of Marshall, who was able to deal with and dispose of his own property, the trustee of Lindsay is entitled to the proceeds of this ship, and there is no ground whatever for the claim which the bankers make as the holders of the bills. The order of the County Court must be discharged.

(1) 19 Ves., 345.

there been no agreement the vendor would have been entitled to a lien on the *ship for the amount of the bills. It is the bankers' money which has built the ship. This is like the ordinary case of the vendor of a bale of cotton drawing for it on the purchaser. The vendor gets the bill discounted. Both vendor and purchaser become insolvent, and the bill is not paid. In such a case it is a mere matter of course that the cotton shall pay the bill. The vendor's estate cannot have the goods because he has sold them; the purchaser's estate cannot have them because he has not paid for them. That is exactly the present case, and the rule in *Ex parte Waring* (*) was adopted as the only way of getting rid of the dead lock, and by it the bill-holders benefit. The doctrine applies directly there is a double insolvency; it is not necessary that there should be a bankruptcy: *Powles v. Hargreaves* (*). The assignees of a bankrupt cannot defeat this right of the bill-holders when it has once attached, nor 412] can the debtor himself defeat it by compounding *with his creditors. Lindsay was in a state of insolvency from the 14th of August, Marshall from the 31st of July, so that the equity had attached long before the notice to rescind was given. Our case is supported by *Bank of Ireland v. Perry* (*). The decision of the Chief Judge, that no property passed, is contrary to *Woods v. Russell* (*) and *Wood v. Bell* (*). The cases of *Bishop v. Shillito* (*) and *Barrow v. Coles* (*), referred to below on the other side, are inapplicable.

Mr. Little, Q.C., Mr. Winslow, Q.C., and Mr. Colt, for the trustee: *Ex parte Waring* (*) does not apply. The resolutions in Marshall's composition were completed on the 18th of September, so that he was competent to deal with his property, and on the 10th of October he gave notice to rescind.

[THE LORD JUSTICE MELLISH: How do you show that that notice was accepted.]

There is no evidence of its having been in express terms accepted, but the conduct of the parties shows that they agreed to abandon the contract. The property in the ship did not pass to Marshall, Osborne & Co.: *Mucklow v. Mangles* (*). But suppose it did, the interest of Marshall, Osborne & Co. was over-ridden by the vendor's lien, which is expressly stipulated for by the contract. No one, therefore, can take the possession from Lindsay's trustee except

(1) 19 Ves., 345.

(2) 3 D., M. & G., 430.

(3) Law Rep., 7 Ex., 14.

(4) 5 B. & A., 942.

(5) 5 E. & B., 772; 6 E. & B., 355.

(6) 2 B. & A., 329, n.

(7) 3 Camp., 92.

(8) 1 Taunt., 318.

by satisfying this lien : *Ex parte Chalmers* ⁽¹⁾. There never were two bankruptcies or insolvencies subsisting together, for Marshall was discharged by his composition before Lindsay's petition was filed, so the state of circumstances necessary to bring *Ex parte Waring* into application never existed.

Mr. *De Gez*, in reply : In *Powles v. Hargreaves* ⁽²⁾ the representatives of one party disclaimed, and the court held this to make no difference. The *notice by Marshall [413 to rescind cannot, therefore, take away the equity of the bill-holders.

SIR W. M. JAMES, L.J. : I am of opinion that the appellant's contention in this case is really a *reductio ad absurdum* of the case of *Ex parte Waring* ⁽³⁾. The bill-holders never, either by contract or the conduct of anybody, acquired or had any charge whatever, direct or indirect, upon this thing which was to have been a ship, and which has now become a ship. They were bill-holders having a right against the acceptor, and having a right against the drawer. The bills came into existence, no doubt, in connection with a contract for building the ship, and in a certain state of circumstances, if there had been two insolvent estates under the administration of the Court of Chancery or the Court of Bankruptcy, or one estate under the Court of Bankruptcy and one estate under the Court of Chancery, it might have been the duty of the trustees of the one estate, as against the trustees of the other estate, or it might have been the duty of both sets of trustees, to have insisted upon the ship being sold, or that which was to be a ship being sold, for the purpose of taking up the bills. I say there might have been circumstances, which one might well conceive, in which such a right would have been acquired ; but I cannot conceive that because in such a state of circumstances as that, merely in order to get rid of what is said to be a dead lock, a course is adopted in which accidentally and casually a benefit arises collaterally to the persons who were holding the bills, therefore the bill-holders, who never had a right by contract or otherwise with regard to the ship, could interfere with the right of the two parties, the vendor and the purchaser, or the assignees of the vendor, or the assignees of the purchaser, to make such arrangements as they otherwise could honestly and properly make with regard to that thing which is the subject of an executory contract. I cannot conceive that the holders of the bills would have a right to interfere in such a case as that. Mr. Marshall had a full

⁽¹⁾ Law Rep., 8 Ch., 289-293.

⁽²⁾ 3 D., M. & G., 430.

⁽³⁾ 19 Ves., 345.

right, if he thought it was for the benefit of himself or his creditors, to rescind or abandon the contract, and to say, 414] "I *cannot complete," and the other had a right to say, "We will accept your abandonment of the contract, and we will complete the ship for ourselves and take whatever remedies we may have." It seems to be an absolute right in the parties, on the one side, to make the abandonment, and on the other to accept it. There never was a moment of time at which Messrs. Marshall & Osborne, or their assignees, had a right to say, "Sell that unfinished chattel and apply the proceeds in the payment of the bills, because both you and I are liable to the holders of them." There was no such right, and Messrs. Marshall & Osborne could not, by becoming insolvent, alter the rights of the other party. The right of the other party was to say, "I will keep that ship until you have paid the purchase-money," and the bankers had no right to interfere with the contract which existed between Messrs. Marshall & Osborne and the vendor, or to enlarge the rights of Messrs. Marshall & Osborne, or to diminish the rights of the vendor. The Chief Judge was of opinion that the purchaser had no interest in the ship except a right to have it upon payment. It appears to me that it is altogether unnecessary to decide any point as to the exact nature of the property which was transferred from time to time, or the exact nature of the charge or lien which from time to time existed with regard to it. The substance of the contract was that the vendors, that is, the makers or the builders of the ship, were not to part with their whole interest, legal and equitable, except in exchange for full payment of the purchase-money, less the last instalment, and, therefore, they had a right to say to every one you shall not take that ship unless you pay the full purchase-money. I am of opinion, therefore, that the Chief Judge was perfectly right in the decision at which he arrived.

SIR G. MELLISH, L.J.: I am of the same opinion. I confess that when this appeal was first opened I was a little alarmed at what appeared to be an expression of opinion on the part of the Chief Judge in Bankruptcy that no property had passed in this ship; because for years I have always understood the law to be, since what was said by Lord Tenterden in the case of *Woods v. Russell* (¹), that 415] where *a contract is made for building a ship and the price is to be paid by instalments in proportion to the amount

(¹) 5 B. & A., 942.

of the work done upon the ship, that there is an inference that the property passes ; because if any doubt were thrown upon that rule, it would, in my opinion, very seriously affect the rights of purchasers of ships to be built in the event of the insolvency of the vendor.

Now that this case comes to be understood, it really seems to me that it signifies very little whether the property had actually passed or not. It appears to me to be perfectly plain upon the construction of the contract, that either the property had passed to the purchaser subject to the vendor's lien remaining in the vendor for all the sums due and owing, except the last bill, or else the property remained in the vendor subject to a charge in favor of the purchaser for any sums that he might pay, and as an indemnity for him as against acceptance of bills, although I rather think myself, having regard to the express mention of the vendor's lien in the contract, that the true construction of the contract is, that the property passed subject to the vendor's lien, not only for the giving of the bills, but until the bills were paid. But although the property may have passed, I apprehend that the purchaser of a ship which is being built for him, is not entitled to possession of it except upon payment of the full amount, and if the purchaser becomes insolvent during the time that the ship is building, his merely becoming insolvent will not of itself dissolve the contract ; but in the case of composition, which this is, where the property of the purchaser never becomes vested in any trustee, it is still for him to determine, or if he becomes bankrupt it is for his trustee to determine, whether it is for the benefit of his estate to have the contract completed, for it does not follow that because he is insolvent it may not be possible for the benefit of the estate to complete the contract. The ship might be very nearly completed, ships might have largely risen in value, and a ship which a man might have to pay £10,000 for, might be worth when completed £15,000. In that state of things, notwithstanding that the purchaser was insolvent, he would have no difficulty in borrowing money upon the ship with which to pay the full price ; and in that case I apprehend that the vendor would be obliged to complete the contract, notwithstanding the *insolvency of the purchaser. On the other hand, when the purchaser becomes insolvent, the contract might be a very onerous one. If the building of the ship were to go on, and it was to be completed, the cost to the estate would only be increased, and therefore it is that he may give notice at once, if he pleases, to the vendor that he abandons the contract, and in that case

1875

Ex parte Lambton. In re Lindsay.

[L.JJ.

the vendor might take the property back to himself and prove for his damages. The effect of giving notice is, that it fixes the damages to the time when the notice is given.

It appears to me, that it is unnecessary to determine whether if Marshall, Osborne & Co. had become bankrupt their trustee might have done that. In point of fact there was a composition which left the property in the ship in them, and I do not understand what possible right the bill-holders had to say that Messrs. Marshall & Osborne were not entitled to abandon their contract with the vendors, if that was most beneficial to them. Then it is said, that if here they gave notice to abandon, there was no sufficient evidence that Lindsay or his trustee accepted the abandonment. I think there is quite enough evidence, for in the absence of evidence to the contrary we may presume that a person accepted an offer which was for his benefit. Lindsay's first bankruptcy was annulled, he went on completing the ship, and when he was made bankrupt upon a subsequent occasion, then his trustee went on and completed the ship. For what purpose did the trustee go on and complete the ship? Was it for the benefit of Messrs. Marshall & Osborne, who had become insolvent, and who had given notice that they did not claim the ship, but had abandoned it? An unfinished ship is worth nothing, and it was necessary to complete it in order to get something for it; and I cannot conceive what possible right the bill-holders had to prevent the trustee from doing so for the benefit of Lindsay's estate. There are various reasons why the rule in *Ex parte Waring* (') should not be applied to this case. One conclusive reason is, that at the time when this application was made, Messrs. Marshall & Osborne had ceased to have any interest whatever in the ship, which was exclusively the property of Lindsay's estate. *Ex parte Waring* only applies either where 417] the property of the acceptor has been pledged *with the drawer, or the property of the drawer has been pledged with the acceptor, and not where the property is exclusively the property of one of the parties. I think, therefore, that the decision of the Chief Judge was perfectly right, and that this appeal must be dismissed, and dismissed with costs.

Solicitors: Mr. G. B. Wheeler; Mr. S. R. Hoyle.

(') 19 Ves., 345.

See note to *Anglo, etc., v. Rennie*, 12 Eng. Rep., 345, 357 note.

EQUITY CASES

(INCLUDING BANKRUPTCY CASES)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

[Law Reports, 19 Equity Cases, 358.]

M.R., Feb. 9, 10, 1875.

*HARRISON V. MEXICAN RAILWAY COMPANY. [358

[1875 H. 9.]

Company—Memorandum of Association—Articles of Association—Powers of Company—Increase of Capital—Preference Shares—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 12.

If the memorandum and articles of association of a company are silent on the subject, it is an implied condition that the shareholders are entitled to rank equal as regards dividend without preference or priority between themselves; but such implication will be rebutted if the articles of association contemporaneous with the memorandum, contain clear provisions as to the preference or priority of classes of shares.

The memorandum of association of a company incorporated under the Companies Act, 1862, declared that the capital was £2,700,000, divided into 135,000 shares of £20 each. It was provided by the articles of association that the directors might, with the sanction of a special resolution of the company previously given in general meeting, increase the capital by the issue of new shares, such increase of capital to be made in such manner, to such amount, and to be with and subject to such rules, regulations, privileges, and conditions as the company in general meeting should think fit:

Held, on demurrer, that special resolutions authorizing an increase of the capital by the issuing of preferred shares were not in excess of the powers of the company.

Hutton v. Scarborough Cliff Hotel Company (1) distinguished.

THE defendants, the Mexican Railway Company, Limited, were a company incorporated and registered as a company limited by shares under the provisions of the Companies Act, 1862, for the purpose of making, maintaining, and

(1) 2 Dr. & S. M., 514, 521; 4 D., J. & S., 672.

working a railway from Vera Cruz to the town of Mexico, with a branch to Puebla, pursuant to certain concessions of the Mexican Government.

By the memorandum of association, dated the 19th of August, 1864, it was declared that the capital of the company was £2,700,000, divided into 135,000 shares of £20 each.

The articles of association were of even date and contained the following clauses :

"39. The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares or stock, or may raise any further sum by the issue of bonds, such increase of capital and such further issue of bonds to be raised and made in such manner, to such amount, and to be with and subject to such rules, regulations, privileges, and conditions as the company in general meeting at the time or respective times of authorizing such creation of new shares or stocks or issue of bonds shall think fit.

"40. Any capital raised by the creation of new shares or stock, unless otherwise directed by the resolution authorizing the same, shall be considered as part of the original capital or stock, and shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital."

It was also provided by the articles of association (Art. 8) that in consideration of the assignment of the concession to be made to the company Antonio Escandon, the concessionaire, his executors, administrators and assigns, should be entitled to receive and should be paid in perpetuity 4 per cent. of the net profits of the company in each year, after payment of all charges and expenses whatsoever, and after payment of a dividend to the shareholders of 8 per cent. per annum ; (Art. 12) that the directors should have power to borrow for the purposes of the company the sum of £2,700,000, and such sum should be raised by the issue of bonds or obligations under the seal of the company, each bond to be of such value as might be determined by the directors for the time being, and to be issued under such conditions and upon such terms as the directors might think fit ; (Art. 13) that all interest or dividends which should be declared on the shares of the company should be paid half-yearly in London, Paris and Mexico, as most convenient to the shareholders ; (Art. 36) that the directors might convert paid-up shares into stock ; (Art. 38) that the several holders of stock should be entitled to participate in the dividends and profits of the company, according to the

amount of their respective interests in such stock; and such interests should, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, and for other purposes, as *would have [360 been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in dividends, should be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred the like privileges and advantages; (Art. 69) that in addition to the sum of £250 per annum each director should also be entitled to receive, as further remuneration for his services, 4 per cent. of the net profits of the company which should remain after a deduction made for the expenses of the company and for the reserve fund thereafter mentioned, and for the payment of the 4 per cent. payable to Escandon, and for interest on the shares of the company to the extent of 8 per cent. per annum; (Art. 82) that during the construction of the different sections of the railway the produce of the sections opened should be applied in payment of the general expenses of the railway, the interest on the company's bonds, and interest on the shares issued to the extent of 8 per cent.; the deficiency, if any, to be made up out of capital; (Art. 83) that after payment of all the costs and expenses of the railway, and payment of the percentage on profits payable to Escandon, and the percentage payable to the directors and the 8 per cent. interest on the shares issued by the company, the directors, before recommending any further interest or dividend to be paid to the shareholders, should appropriate 4 per cent. of the remaining profits as a reserved fund to meet contingencies.

The whole of the original share capital of the company, with the exception of about £250,000, was issued, and the shares which were issued had been fully paid up.

In the course of the construction of the railways the company expended sums in excess of its share capital, and agreed to issue 8 per cent. bonds in satisfaction of the claims of its creditors.

Such bonds, however, were not issued, but special resolutions were passed for the issue of preferred shares in lieu thereof at an extraordinary general meeting of the company held on the 11th of November, 1874, and were confirmed at a second extraordinary general meeting held on the 1st of December.

Such special resolutions were as follows :

"1. That the capital of the company shall be, and hereby is, increased by the addition of so much of the sum of 361] £2,600,000 in *preferred shares of £20 each as shall (with the previous consent of the Mexican Government) be issued by the board of directors to, and taken by creditors of the company as fully paid-up shares in lieu or satisfaction of an equal amount of principal moneys owing or which may be owing by the company on bonds bearing interest at the rate of 8 per cent per annum, agreed to be issued in satisfaction of the claims of its creditors. And that in the division of the net profits of the company accrued in respect of any half year no dividend shall be paid in respect of any share of the original capital until the holders of the preferred shares issued in pursuance of this resolution shall have received a dividend at the rate of 8 per cent. per annum on the nominal amounts of their said shares in respect of that half year. And that after the holders of the said preferred shares shall have received a dividend in respect of any half year at the rate of 8 per cent. per annum on the amounts of their shares, no further dividend shall be paid to them on those shares in respect of that half year, and no deficiency of dividend to either class of shareholders in respect of any one half year shall be made good out of any excess of profits in respect of any other half year. And further, that in case any surplus of the capital assets of the company is to be returned to shareholders upon the winding-up of the company, or otherwise, the holders of the preferred shares to be issued in pursuance of this resolution shall be entitled to have the full nominal amount of their said shares returned to them before any return of capital is made in respect of any shares of the original capital of the company."

"2. That the capital of the company shall be, and is hereby, increased by the addition thereto of so much of the sum of £1,200,000 in preferred shares of £20 each as shall be issued by the board of directors to, and taken by creditors of the company in satisfaction of, an equal amount of the moneys owing by the company to them for interest accrued before the year 1874. And that in the division of the net profits of the company accrued in respect of any half year no dividend shall be paid in respect of any share of the original capital of the company until the holders of the preferred shares issued in pursuance of this resolution shall have received a dividend at the rate of 6 per cent. per annum on the nominal amounts of their shares in respect of 362] that half year. *And that after the last-mentioned

dividend has been paid no further dividend shall be paid in respect of the said preferred shares out of the profits of that half year, and no deficiency of dividend to either class of shareholders, in respect of any one half year, shall be made good out of any excess of profits out of any other half year."

"3. In the division of the net profits of the company accrued in respect of any half year no dividend shall be paid in respect of any preferred share, which in pursuance of a special resolution (marked 2), passed on the day of passing this resolution, shall be issued to, and taken by, a creditor of the company in satisfaction of an equal amount of interest owing to him by the company, until the holders of the preferred shares which in pursuance of a special resolution (marked 1), also passed on the day of the passing of this resolution, may be issued to, and taken by, creditors of the company in lieu of bonds, shall have received a dividend at the rate of 8 per cent. per annum in respect of that half year."

The bill was filed on the 13th of January, 1875, by George Sydney Harrison, on behalf of himself and all other the holders of shares in the original capital of the company, except the defendants, against the company and the directors. It contained statements to the foregoing effect, and alleged that the directors had applied for and expected to obtain the consent of the Mexican Government to the issue of preferred shares pursuant to the resolutions, and that acting under color of the resolutions, they threatened and intended to issue to the creditors of the company (who were willing to accept the same) new shares of the company in discharge and satisfaction of the amounts due to such creditors, for principal and interest, and to attach to such shares a preferential dividend of 8 per cent., in priority to the holders of the original share capital, and also (as respects the new shares to be issued in satisfaction of the principal moneys due to such creditors) a right, in case any surplus of the assets of the company was to be returned to shareholders upon the winding-up of the company or otherwise, to have the full nominal amount of the said new or preferred shares returned before any return of capital was made to the holders of the original shares.

The bill charged that such issue of preferred shares was *not authorized by anything contained in the memo- [363
randum or articles of association, and was in excess of the power of the company; and that even if the special resolutions could operate as an alteration of the articles of asso-

ciation so as to confer on the company power to issue preferred shares, such an alteration would be inconsistent with the fundamental constitution of the company; and prayed that it might be declared that the increase of the capital of the company by the issue of such preferred shares was in excess of the powers of the company, and that the defendants might be restrained from creating any shares purporting to be preferred shares of the company, pursuant to the special resolutions.

The company demurred to the bill.

Mr. *Southgate*, Q.C., and Mr. *Kekewich*, for the demurrer: The question is, whether the articles of association authorize the increase of the capital by the issue of preferred shares in pursuance of the special resolutions. *Hutton v. Scarborough Cliff Hotel Company* (*), which will be relied on as an authority for the bill, and *Melhado v. Hamilton* (*), are distinguishable. In each of these cases a power to increase the capital by the issue of shares, on such conditions as the company should determine, was held not to authorize the issue of preferred shares. But in the present case there is power to increase the capital by the issue of new shares, "with and subject to such rules, regulations, privileges and conditions" as the company shall direct. It is submitted that a preferential right to dividends is a privilege within the meaning of article 39, and that the demurrer must be allowed.

Mr. *Fischer*, Q.C., and Mr. *Davey*, in support of the bill: The constitution of a company incorporated under the provisions of the Companies Act, 1862, is contained in the memorandum of association, and cannot be qualified by inconsistent expressions occurring in the articles in the face of the prohibition against alteration occurring in sect. 12 of that act: *In re Financial Corporation* (*). It is part of the 364] constitution of such a company, in the *absence of a stipulation to the contrary, that the shareholders shall participate equally in the profits. To create a new class of shareholders with a preference in respect of dividends over the original shareholders would be an essential alteration of the constitution, and not a mere matter of internal regulation: *Bryon v. Metropolitan Saloon Omnibus Company* (*); *Hutton v. Scarborough Cliff Hotel Company* (*); *Melhado v. Hamilton* (*). It is submitted, therefore, that the proposed increase of capital by the issuing of new shares with a preference dividend is in excess of the powers of the company. It has been

(1) 2 Dr. & Sm., 521.

(2) 21 W. R., 619, 874.

(3) Law Rep., 2 Ch., 714.

(4) 3 De G. & J., 123.

argued that this is not the case, because of the ambiguous word "privileges" occurring in art. 39; but whatever might be the meaning of the word standing alone, it is controlled here by the context, it being clear from articles 8, 13, 38, 69, 82, 83 that the intention of the parties to the contract was that all the shareholders alike should, if possible, receive 8 per cent. on their shares.

SIR G. JESSEL, M.R.: The first question to be decided is, what is the law on this subject? I am bound by the decisions in *Hutton v. Scarborough Cliff Hotel Company* (1), not only by the decision of Lord Chancellor Westbury, but also by the decision of Vice-Chancellor Kindersley, although that is a decision of a court of co-ordinate jurisdiction. It is not a recent decision, and it is not one that I can take upon myself to pronounce to be erroneous. I mention those decisions as binding upon me, because I desire to abstain from expressing any opinion of my own as to the correctness of either of those decisions.

It has been admitted that the effect of the second decision of Vice-Chancellor Kindersley, in *Hutton v. Scarborough Cliff Hotel Company*, is no more than this, that the 12th section of the Companies Act, 1862, prohibits any alteration of the conditions of the memorandum of association, whether such conditions are expressed or implied; and if the memorandum of association is silent upon the subject of the terms of the original contract under *which the company [365 was formed, then there is an implied condition that all the holders of shares are entitled to rank equally as regards dividend, without any preference or priority between themselves; but if it does clearly appear upon the articles of association that that was not the meaning of the original contract, then there is no such implication of law as to the meaning of the memorandum of association, that implication being rebutted by the clear terms of the contemporaneous instrument. It was asserted that the intention to confer a priority must clearly appear by the articles of association. But that argument does not carry the case any further, because if the true construction of an instrument is once discovered by ordinary rules of interpretation, then that construction does clearly appear upon the written instrument, that is, with sufficient clearness for the court to act upon it. So that, after all, the real question to be decided is, whether or not, according to the true construction of these articles, the company has or has not power to issue shares to which a preferential dividend shall be attached.

(1) 2 Dr. & Sm., 514, 521; 4 D., J. & S., 672.

The formation of the company is peculiar. The memorandum of association is silent upon the point; it simply gives the number of the original shares, and there it stops. The articles of association clearly contemplate an increase of capital, and the question is, upon what terms that capital can be increased. It is to be observed that in the construction of these articles we must not pay too much attention to the technical meaning of some of the terms used. Some of those terms are used indifferently, either in a popular sense, or a technical sense. The first article to which attention has been drawn, and which it is necessary to discuss, is the 8th, by which Escandon is to be "entitled to receive, and shall be paid in perpetuity, 4 per cent. of the net profits of the company in each year, after payment of all charges and expenses whatsoever, and after payment of a dividend to the shareholders of 8 per cent. per annum." The word there used is "dividend," and I think that is the correct word to use, when you find afterwards out of what fund the 8 per cent. is to be paid. The next article is the 13th, and there the draftsman departs from the ordinary use of technical language, and begins in this way: "All interest or dividends which shall be declared on the shares of the company shall be payable *half-yearly in London, Paris and Mexico." Now, strictly speaking, interest is not payable upon the shares of the company, though dividends are, being dividends payable out of net profits. But there he varies his language from "dividends" to "interest or dividends." Then we come to the 38th article. There is a previous article which provides that shares may be converted into stock. The stockholders are to have "the same privileges and advantages, for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company, but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages." There is an observation to be made upon that article, that whatever meaning the word "privileges" may have, standing *per se*, it does in that article include participation in dividends and profits, or, to speak more accurately, the right so to participate.

[His honor then read the 39th article, and continued:]

Words of larger import could hardly be imagined. Yet it is said that the language is not sufficient to convey the

power to authorize the shares which are issued for the purpose of increasing the capital to be issued with the privilege of having attached to them a preferential dividend. The capital is to be raised or to be increased "in such manner, and with and subject to such rules, regulations, privileges and conditions," as the company may think fit. I can find no such limit either in the term "privilege" or in the term "condition" as has been suggested. It seems to me that they are words of extensive meaning, and fully ample to cover all that is proposed to be done. I should say, had I not heard a long argument upon the subject, that they are words free from ambiguity and do not raise any doubt as to their meaning. I think that there is no limit to the privilege that may be attached to the shares by the general meeting, so far as regards participation in dividends, or any other right whatever.

But then it is suggested that some other clauses control it. The 40th article appears to me to support the construction I have mentioned of the preceding article, if it required any support *whatever, which I do not think it does. It [367] excepts what is "otherwise directed in the resolution authorizing the same;" that is, it implies that the resolution authorizing the same may direct that the shares so issued shall be treated in a manner altogether different from the manner in which they would be treated if they were considered as part of the original capital. The argument in support of the bill is, that there is no power to issue shares that shall not carry an equal right with the original shares to participation in the dividends.

Another clause that I have been referred to is the 69th, where the word used is "interest." But, having traced the history of this term throughout the articles, I cannot accede to the argument that the 8 per cent. is other than a dividend. The 82d article is limited to the period of construction of the line, and there the word, no doubt, is "interest." The 83d article also has the word "interest." The thing is, as I said before, correctly described as a dividend, because you pay your expenses before you get to the payment of 8 per cent. In other words, the result of the articles is this, that you do not pay more than 8 per cent. in the shape of dividend to the shareholders until you have set aside a reserve fund of 4 per cent., and have obtained the sanction of a general meeting to such further distribution of profits.

Those are all the articles to which my attention has been drawn; and I think it does fairly and clearly appear from them that there is no limit to the power of the company to

1875

Harrison v. Mexican Railway Co.

M.R.

issue new shares with a preference dividend. But there is one observation upon the 39th article that occurred to me during the argument. The power is not confined to an increase of capital by the issuing of new shares and stock, it extends to the raising of money by bonds. Now the interest to be paid upon such bonds would precede the dividend upon the shares, and it appears to me that that shows strongly that the meaning of the draftsman was, that the company might attach a preferential payment to anything issued under the 39th article, whether bonds or shares.

But the peculiarity of the case does not quite stop there, for, having agreed to issue the 8 per cent. bonds, the company now propose to issue these new preference shares bearing the same rate of interest to the bondholders; so that, 368] instead of derogating *from the rights of the original shareholders, they are in fact assisting them. In other words, instead of having the right to demand both principal and interest before the other shareholders can get anything, to the imminent danger of destroying the company, the creditors are now restricted to a demand for interest only, and that only if the revenue of the company is sufficient to pay it. It is plain, therefore, that what is proposed to be done does not in any shape or way derogate from the original right of the shareholders.

Taking the whole matter into consideration, I have arrived at the conclusion that what is proposed to be done is proper to be done, and therefore I shall allow the demurrer.

Then comes the question of costs. I must say, if contracts are drawn in the way this contract has been drawn, I cannot be surprised at persons not thoroughly understanding their meaning at first sight; and I do not think that the directors, in a case of this kind, ought to complain of the result if, as I intend, I make no order as to costs.

Solicitors for the plaintiff: Messrs. *Randall & Angier*.

Solicitors for the defendants: Messrs. *Freshfields & Williams*.

It is not *ultra vires* for a railroad company to agree to issue to contractors, for the completion of the road, preferred stock; provided the whole number of shares does not exceed the amount authorized by the charter: *Hazelhurst v. Savannah, etc.*, 43 Georgia, 13. 2 Redf. on Railways (5th ed.), 527; *Brice's Ultra Vires*, (1st Am. ed.),

145-7; *Everhart v. Westchester, etc.*, 28 Penn. St. R., 339.

See *Matter of Bangor, etc.*, L. R., 20 Equity Cases, 59, to appear in next volume.

An agreement by a corporation to pay annual dividends to preferred stockholders, without reference to its ability to pay them from earnings, is opposed

to public policy and void: *Lockhart v. Van Alstyne*, 31 Mich., 76.

As to when a corporation is bound to pay dividends on preferred stock, and the remedy therefor, see *Lockhart v. Van Alstyne*, 31 Mich., 76; *Taft v. Hartford, etc.*, 8 Rhode Island, 310; *Bailey v. R. R. Co.*, 17 Wallace, 90, 1 Dillon, 174; *Prouty v. Michigan, etc.*, 4 N. Y. Supreme Ct. Rep., 230, 1 Hun, 655; *Thompson v. Erie Railway Co.*, 45 N. Y., 468; *Bates v. Andruscoggin, etc.*, 49 Maine, 491; *St. John v. Erie, etc.*, 10 Blatchf., 271; 2 Redfield on Railways (5th ed.), 527; Brice's Ultra Vires, (1st Am. ed.), 147 n.; *Everhart v. Westchester, etc.*, 28 Penn. St. R.,

180; *St. John v. Erie Railway*, 22 Wall., 136.

An action at law may be maintained against a railway company by the holder of shares, for not appropriating to the shares of such holder a due proportion of the funds applied by the company in payment of dividends on other shares of the same order of priority with those of the plaintiff. The question as to whether certain preferred shares were to be paid a preferred dividend out of the profits of the company, *pari passu* with preference shares issued under a prior act determined: *Coey v. Belfast, etc.*, Irish L. R., 2 C. L., 112.

[Law Reports, 19 Equity Cases, 369.]

V.C.M., Feb. 19, 1875.

*SCRUTTON V. PATTILLO.

[369

[1870 S. 250.]

Wife's Property—Reduction into Possession.

A woman having a sum of money deposited with a merchant, and standing in her name, married a man whom she afterwards accompanied on a voyage, and both were drowned at the same time. The money was transferred by the merchant into the names of the husband and wife; but the only direction given to the merchant by the husband was to keep this property separate from his other moneys. The husband by his will, after reciting that his wife had previously to her marriage deposited with the merchant this money, which was standing in her name, disposed of the property as his own:

Held, that the husband had done no act to reduce the wife's money into possession, and that it would go to her personal representatives.

PETITION.

The petition stated that Catherine Ewin, the widow of a captain of a merchant vessel, had become possessed of his property on his death to the amount of £752, which was deposited in the hands of Messrs. Scrutton & Co., shipbrokers. Catherine Ewin afterwards married Augustus Edward Morris, also the captain of a merchant vessel, belonging to Messrs. Scrutton, Sons & Co.

In March, 1866, A. E. Morris made his will, and on the 14th of November, 1866, he executed the following codicil to his will:

"Whereas my wife previous to her marriage with me deposited with Messrs. Scrutton, Sons & Co. the sum of £750, which said sum is now standing in the name of my said wife, now I do hereby in the event of myself and my wife dying

about the same time give and bequeath the said sum, or any other sum of money that may be standing in the name of my said wife with Messrs. Scrutton, Sons & Co., or any other person or persons, in manner following, that is to say: the sum of £100 part thereof to William and Catherine Pattillo, the father and mother of my said wife, or to the survivor of them; the remainder to and between the children of James and Margaret Pattillo, to and between the children of Thomas and Elizabeth MacIntire, to James Black, and to Robert Black, or to the survivor or survivors of them, in equal shares."

370] *In the beginning of the year 1868 Catherine Morris accompanied her husband Captain Morris on a voyage in the ship *Joseph Hume*, which was run down by another vessel in May, 1868, and foundered, and both Captain Morris and his wife were drowned at the same time.

It appeared that after the death of Mrs. Morris's first husband the above sum of £752 was transferred into her name in the books of Messrs. Scrutton & Co., and when she married the testator it was still standing in her name in the said books, but the money was subsequently transferred to an account headed "Captain and Mrs. Morris."

The petitioner was the personal representative of Mrs. Morris, and the petition prayed that the £752 so standing in the books of Messrs. Scrutton & Co. might be paid over to him.

The question now raised was, whether the £752 properly belonged to Captain Morris at the time of his death, or whether it remained the property of his wife and passed to her legal personal representatives.

Mr. Thomas Scrutton, of the firm of Scrutton, Sons & Co., stated in an affidavit, that Captain Morris had given directions to the firm to keep this money separate and distinct from his other property in their hands. The witness could recollect no other directions given by the testator as to the money.

It was also in evidence that both Captain and Mrs. Morris had drawn drafts upon this fund which had been honored by the merchants.

Mr. *J. Pearson*, Q.C., and Mr. *E. Robertson*, in support of the petition: It is admitted by all parties in this case that it cannot be ascertained which of the two persons, Captain Morris or his wife, Catherine Morris, died first; therefore the question is, whether Captain Morris had reduced into possession this sum of £752, which was his wife's property when he married her. By the codicil to his will he dis-

posed of the money, and provided for the event which happened—that of the two dying at the same time; but this is no proof that he had done any act to reduce it into possession. At the date of the codicil the money was standing in the *books of Messrs. Scrutton & Co. to an account [371] headed “Captain and Mrs. Morris,” and there is the evidence of Thomas Scrutton that Captain Morris directed them to keep this money separate and distinct from his other property in their hands. It is submitted that his direction to keep the money separate is evidence that he did not intend to exercise any act of ownership over it. There is no evidence that it was directed to be placed in the joint names of the husband and wife, this must have been done in a purely voluntary manner by Messrs. Scrutton & Co. *Prima facie*, then, the money was the property of the wife, and we seek to have it paid over to her representatives; the burthen, therefore, rests on the husband’s representatives to show that he ever reduced it into possession.

Mr. *Glasse*, Q. C., and Mr. *J. Cutler*, for the administrator of Captain Morris: The testator by the codicil to his will assumed to dispose of this property, and we, therefore, say that the burden of showing it was not his rests with the representatives of the wife. There is evidence that the testator directed the money to be kept separate and distinct, and the fact that after the marriage the money was transferred to a new account by the firm, and placed in the names of Captain and Mrs. Morris, shows that Captain Morris exercised a control over it, and must have believed that he had done all that was necessary to make the property his. He would not otherwise have disposed of it by the codicil to his will. The fact of his drawing out a portion of the money is also sufficient to cause a reduction into possession of the whole fund.

[As to the onus of proof they cited *Wing v. Angrave* (*); *In re Lewes’ Trusts* (*); *In re Phene’s Trusts* (*); *Underwood v. Wing* (*).

Mr. *Whitehouse*, for Messrs. Scrutton & Co.

Mr. *W. F. Robinson*, for other parties.

*SIR R. MALINS, V. C.: The circumstances in this [372] case are rather peculiar. It appears that Captain Ewin, the captain of a merchant ship, died in 1865, and his widow became possessed of his property, amounting to £752, which was at the time of Captain Ewin’s death deposited with the firm of Scrutton & Co., who were the owners of the ship

(1) 8 H. L. C., 183.

(2) Law Rep., 5 Ch., 139.

(3) Law Rep., 11 Eq., 236; *Ibid.*, 6

(4) 4 D., M. & G., 633.

Ch., 356.

of which he was captain ; and after his death the money was transferred into the name of his widow, and was standing to an account headed with her name on the 28th February, 1866. The widow afterwards married Captain Augustus Edward Morris, who was also the captain of a ship owned by Messrs. Scrutton & Co., and she went with her husband on a voyage. The ship in which they sailed was run into by another vessel, and it foundered and both the husband and wife were drowned. Now if anything had been done by Captain Morris by which he had exercised an ownership over the fund in question, then the money would have been reduced into possession by him, and being reduced into possession, then it is clear that those claiming under him would be entitled to the money, and so also the money would belong to his representatives if Captain Morris had survived his wife, but as they both died under the circumstances I have stated, it is impossible to prove which of them died first. For the purpose of showing that the husband had a right to dispose of his wife's property, you must either prove that she died before him or that he reduced the property into possession during his life. And for this purpose conjecture will not do, you must have proof of the fact. What then is the proof ? It appears that about a month before the marriage this sum of £752 ceased to stand in the books of the firm to the credit of the wife, for I find upon examining the books of the firm, which are kept in the usual correct style of merchants in general, that the money is entered on a page to which there is no heading, but in the corner I observe that the words Captain and Mrs. Morris are written in pencil. The conclusion I draw from this is that Messrs. Scrutton & Co. knew the money had belonged to Mrs. Morris's first husband, and that it then belonged to her, but they did not exactly know in what name it was then to be entered, consequently until they had some information upon the subject they entered it in blank and 373] wrote "in the corner the names of Captain and Mrs. Morris to indicate to whom it belonged. Then the account is subsequently transferred to another book, and there we find it entered under the heading Captain and Mrs. Morris, which leads me to believe that the clerk who entered the account, seeing those names in pencil, thought he was doing right in entering the amount to the credit of Captain and Mrs. Morris, and did so without any authority upon the subject. But to prove that the property was reduced into possession by Captain Morris it must be shown that this was done by his express direction. There must be positive proof whether it was done by his direction or not. It appears that

both Captain Morris and his wife drew upon this fund. Mrs. Morris wrote a letter to the firm requesting them to pay a sum of money to her parents, and this letter was honored, in so far that the firm, knowing that the money had belonged to Mrs. Morris, made no objection to the payment of a sum of money out of it to the person named in the letter. In other words, they honored her check. But not only did Mrs. Morris draw upon the fund, but Captain Morris also drew upon it. I put this question during the argument, suppose a wife on her marriage is possessed of a sum of £1,000, and her husband draws out £100, portion of his wife's property, does that prove that he reduced into possession the remaining £900? I am clearly of opinion that it does not. If there is a large sum belonging to the wife, and part of it is dealt with by the husband either by drawing checks upon it or otherwise, all that he does not deal with remains in the possession of the wife. If there was clear evidence that Captain Morris intended to reduce this property into possession then there could be no question that those persons who claimed under him would be entitled, but what is the evidence? There is an affidavit made by Mr. Thomas Scrutton, one of the firm, in which he says that he does not remember whether Captain Morris or his wife ever gave any special instructions as to how this sum was to be dealt with, except that Captain Morris directed it should be kept separate and distinct in the books of the firm from the rest of the money belonging to him; the meaning of this probably was, that knowing it to have been his wife's he did not wish it mixed up with his own accounts, but this is no evidence to show that he ever *dealt [374 with the property as his own or intended to reduce it into possession.

There is no further evidence to prove the case, and under these circumstances my opinion is that the persons claiming under Captain Morris's will have no right to the fund, and it must go to the legal personal representatives of the wife.

Strictly speaking, the costs would follow the result and the losing party would have to pay the costs, but as the question is a fair question to raise, and the parties not objecting, I think all the parties to this petition should have their costs out of the fund.

Solicitors for the plaintiff: Messrs. *Pitman & Lane*.

Solicitors for the defendants: Messrs. *Nash, Field & Mathews*.

[Law Reports, 19 Equity Cases, 395].

V.C.B., Feb. 17, 18, 19, 24; March 3, 1875.

395]

*THURSBY V. THURSBY.

[1873 T. 1.]

Will—Tenant for Life and Remainderman—Leasehold Collieries—Profits, how to be enjoyed.

A testator, seized of real estate, and possessed of leasehold collieries which he was working, by his will devised all his real estate, "and also" all his leasehold estates, "and" all his "goods, chattels, and credits" to three trustees, so that they should have the legal estate, upon trust, as to one moiety for his married daughter for life (not to her separate use), then to her husband (one of the trustees) for life, then to her first son absolutely; and as to the other moiety for his only other child, an unmarried daughter, for her separate use for life (without restraint upon anticipation), then to her children, and in default (which happened), upon the trusts of the other moiety. He empowered the married daughter, and her husband, and also the unmarried daughter, to appoint portions to be raised and paid out of his "said real and personal estates respectively." He empowered the unmarried daughter to appoint any part not exceeding one half of the "rents, issues, and profits, interest, dividends, and annual income" of her moiety during the lifetime of any husband for his use. The trustees were empowered to "levy and raise and pay and apply" for advancement any part or parts of the moieties; and to pay and apply such part as they should think fit of "the income and annual produce" for maintenance. He gave power to the trustees to lease "all or any part" of his "said freehold or leasehold estates" for twenty-one years; to "alter, vary, and transpose" the "state of investment of the property," provided the same shall consist of "real estate, securities upon real estate, or shares in the public funds," for which purpose, and also for the purpose of "raising" such sums of money as it might become "necessary to raise in pursuance of the powers," to "sell and convert into money" all or any part of the "said trust estates," or to mortgage the same. He then empowered the trustees, "in case they should deem it beneficial to do so," to continue the collieries and either to increase or abridge the business thereof, and all losses, costs, charges and expenses of carrying on the business should be "borne, paid, and defrayed" out of his "real and personal estate," and also to procure any lease of the collieries to be renewed, and to continue the business after such renewal.

The testator died in 1834. The son-in-law was the sole proving executor, and was the only acting trustee until the marriage of the unmarried daughter in 1835, shortly after which date her husband was appointed co-trustee. The trustees continued and enlarged the colliery business for thirty-seven years, taking leases of additional collieries, making large profits, and greatly increasing the value of the plant.

396] Upon suit by the eldest son of the eldest daughter, claiming to have the *profits over £4 per cent. on the value of the collieries at the death of the testator capitalized, and made to form part of the estate:

Held, that there were sufficient indications of intention in the will to exclude the operation of the rule in *Hove v. Lord Dartmouth* (*), and that the tenants for life were entitled to the enjoyment in specie of the produce of all the collieries.

MOTION for decree.

John Hargreaves, of Ormerod House and of Bank Hall, near Burnley, being seised of considerable real estate, and also possessed of collieries which were being worked by him under leases from other owners, by his will dated the 19th day of May, 1832, devised and bequeathed "all and

(*) 7 Ves., 137.

every the manors, messuages, lands, tenements and hereditaments, and all other my real estate of or to which I or any person or persons in trust for me am, is, or are seised or entitled," whether freehold or copyhold, "And also all and every my leasehold estates, lands, and tenements, and all my goods, chattels, and credits," and other personal estate to the use of three persons, of whom William Thursby and Thomas Legh became the survivors, "their heirs, executors, administrators, and assigns, according to the nature and quality of the said premises respectively, as trustees, and so that they may have and hold the legal estate therein," upon trust, as to one moiety, for his daughter Eleanor Mary, wife of William Thursby, for life, and after her death, upon trust for the said William Thursby for life, and after the decease of the survivor, upon trust for the first or only son of Eleanor Mary Thursby who should attain twenty-one, his heirs, executors, administrators, and assigns, absolutely, "according to the respective nature and qualities of the said premises. He empowered William Thursby and Eleanor Mary his wife, or the survivor of them, to appoint such sum and sums of money "to be raised and paid out of my said real and personal estates respectively" for the portions of younger children as they or the survivor should think proper. He declared that the trustees should be seised and possessed of the other moiety upon trust for the separate use of his daughter Charlotte Hargreaves for life (but without any restraint upon anticipation); and he empowered her to appoint that any part not exceeding one-half of the "rents, issues, and profits, interest, dividends, and annual income," *which after her death should accrue due on the [397 last-mentioned moiety, during the lifetime of any husband she might marry, should be paid to him for his use. The testator directed that after and subject to the estates and interests of his said daughter Charlotte, and any husband she might marry, the moiety and the income thereof shall be held in trust for the children of Charlotte as therein mentioned; and he empowered his daughter Charlotte, whether covert or sole, to appoint "such sum and sums of money to be raised and paid out of my said real and personal estates respectively" for the portion, or for the maintenance, education, or advancement of all or either of her children as she should think proper. He empowered the trustees "at any time and from time to time" thereafter to "levy and raise and pay and apply" for the advancement of the respective eldest or only sons of his daughters any part or parts of the respective moieties, but during the lifetime of the re-

spective parents only with their consent. He further directed that, after and subject to the estates and interests of William Thursby and Eleanor Mary his wife, and Charlotte Hargreaves and any husband who might survive her in whose favor she might have exercised her power of appointment, "and in the meantime and until my said real and personal estate shall become vested in such eldest or only sons" respectively, it should be lawful for the trustees to pay and apply so much as they should think fit of "the income and annual produce of the respective moiety" for his or their maintenance and education. The testator directed that in case either of the moiety should not vest absolutely, it should be held upon the trusts declared of and concerning the other moiety; and in case there should be no person in whom both the moiety should vest, then that the whole should be held in trust for the testator's sister Ann, wife of John Fawcett, her heirs, executors, administrators, and assigns, according to the nature and quality thereof."

The will then contained powers of leasing, of selling, and of continuing the testator's colliery business, in the following terms:

"And I hereby further declare and direct that it shall and may be lawful to and for the trustees or trustee for the time being of this my will to lease all or any part of my said freehold or leasehold estates unto any person or persons for any 398] term or number of *years not exceeding twenty-one years from the making of such leases respectively, so as there be reserved in all such leases to be granted as last mentioned the best and most improved yearly rents that can be reasonably gotten for the same without taking any fine or premium."

"And I do hereby declare that it shall be lawful for the trustees or trustee for the time being of this my will from time to time to alter, vary, and transpose the state of investment of the property which from time to time shall be by them held upon the trusts aforesaid; provided and so that the same shall be made to consist of real estate, securities upon real estate, or shares in the public funds, for which purpose and also for the purpose of raising such sum or sums of money as it may become necessary to raise in pursuance of the powers and provisions in this my will, it shall be lawful for the said trustees or trustee from time to time to sell and convert into money all or any part of the said trust estates, or to mortgage the same either absolutely or in fee, or for any term or number of years, and to receive the moneys arising therefrom, and give and sign receipts

therefor, and to lay out and invest the same or the remainder thereof, after paying such sum or sums of money as aforesaid, in the purchase of real estate, or on securities upon real estate, or in the public funds, and from time to time to alter, vary, and transpose such investments as aforesaid."

"And I hereby empower the trustees and trustee for the time being of this my will, in case they shall deem it beneficial so to do, to conduct, carry on, and continue the collieries which I am possessed of, and either to increase or to abridge the business thereof; and all losses, costs, charges, and expenses of carrying on and continuing the said business shall be borne, paid, and defrayed out of my real and personal estate, and also to procure any lease or leases of the said collieries to be renewed to them, and also to continue the business thereof after such renewal."

The testator died on the 5th of April, 1834, a widower, and leaving his only issue the above-mentioned daughters, Mrs. Thursby and Miss Charlotte Hargreaves. The will was proved by William Thursby alone.

The personal estate was insufficient, and a portion of the real estate, with which the debts, funeral, and testamentary expenses and legacies were paid, was sold by the trustees. [399]

The collieries of which the testator was possessed at his death were eleven in number, held under three separate leases. The stock belonging to them was valued on the 31st of December, 1834, at £17,575 0s. 9d.

In December, 1835, Miss Charlotte Hargreaves married the Hon. James Yorke Scarlett, afterwards General Sir James Yorke Scarlett; and in September, 1836, General Scarlett was appointed one of the trustees of the will, together with William Thursby and Thomas Legh.

In May, 1857, Thomas Legh died.

General Scarlett died on the 6th of December, 1871, having by will bequeathed the whole of his property, real and personal, to his widow, Lady Scarlett, and having made her his sole executrix.

There was never any issue of the marriage of General and Lady Scarlett.

William Thursby and General Scarlett, who were the acting trustees of the testator's will, continued the business, renewed the existing leases when they expired, and took or agreed to take leases of other collieries, with the result that, during the thirty-seven years which elapsed from the testator's death to the death of General Scarlett, the profits

averaged nearly £11,500 a year. The colliery plant was valued in December, 1871, at £161,533 10s. 7d.

On the 22d of March, 1872, Lady Scarlett was found by inquisition to be a lunatic; and the question arose, whether the tenants for life were entitled to the profits of the collieries in specie, or whether they were entitled to only 4 per cent. on the value of the collieries at the testator's death, the surplus forming part of the testator's estate.

Administration with the will annexed of General Scarlett's estate was, on the 14th of November, 1872, granted to Mrs. Thursby during the lunacy of Lady Scarlett.

The bill was filed on the 7th of January, 1873, by the first son of Mrs. Thursby, named John Hardy Thursby, who was born on the 31st of August, 1826, against William Thursby, 400] Eleanor Mary *his wife, Lady Scarlett, and Thomas Hughes, her committee in lunacy, and the representatives of Thomas Legh.

It prayed (amongst other relief which it is unnecessary for the present purpose to state) for a declaration that the tenants for life under the will "were not and are not" entitled to receive the rents and profits of the collieries in specie, and that a value ought to be put upon the collieries of the testator at the time of his death, and that such allowances might be made to the tenants for life out of the profits, by way of interest, as to the court should seem proper; and that the residue of the profits ought to be invested and form a part of the testator's estate.

It further prayed a declaration that the defendant William Thursby, and the estates of General Scarlett and Thomas Legh, were jointly and severally liable to make good to the testator the amounts received out of the proceeds of the collieries on account of the tenants for life in excess of the amounts to which they were properly entitled; but at the hearing the relief prayed against the estate of Thomas Legh was abandoned, and his representatives were dismissed from the suit with their costs.

Mr. Southgate, Q.C., Mr. Little, Q.C., and Mr. Edmund S. Ford, for the plaintiff, the remainderman: We rely upon *Meyer v. Simonsen* (1) and *Brown v. Gellatly* (2).

The question is, has the testator bequeathed his mines in specie, so that the tenants for life can take all the profits, or are they entitled to no more than £4 per cent. interest on the value from the time of the testator's death, and interest on the capital sum which should have been accumulated from

(1) 5 De G. & Sm., 723.

(2) Law Rep., 2 Ch., 751.

year to year by accretions of surplus of profits over such £4 per cent., and invested in £3 per Cent. Government Stock?

The only clause which furnishes ground for argument is the power to continue the colliery business; and there, the words "in case they shall deem it beneficial so to do" are equivalent to the words "for the benefit of my estate" in *Brown v. Gallatly*.

In other respects, it is the ordinary case of a gift to a tenant for life, with remainders over. The words "rents, issues, and profits" *occur only once. The power of leasing [401] is in the ordinary form of a power to grant agricultural leases; it does not extend to mines.

In *Morgan v. Morgan* (*) the absence of a trust for conversion was relied upon, but the rule was applied notwithstanding. Here we have a power for conversion. But in truth no trust for conversion is necessary, where there is an intention to give enjoyment in succession. "Beneficial" means beneficial, not for one class of takers to the injury of another, but beneficial for all alike: *Gibson v. Bott* (*); *Howe v. Lord Dartmouth* (*); *Caldecott v. Caldecott* (*); *Meyer v. Simonsen* (*); *Re Llewellyn's Trusts* (*); *Brown v. Gellatly* (*).

That a lease renewed by a trustee is renewed for the benefit of the estate, appears, if necessary, from *Keech v. Sandford* (*); and it is equally clear that a trustee cannot make a profit out of the trust estate for his own benefit.

Mr. Jackson, Q.C., and Mr. E. Cutler, for the committee in lunacy of Lady Scarlett: The rule in *Howe v. Lord Dartmouth* may be applied to a gift of residue; it has never been applied to a specific devise or bequest. It is confined to cases of property given *en masse*, to be enjoyed in succession: *Pickering v. Pickering* (*).

The presence or absence of a trust for conversion makes all the difference. In this case there is a power to convert, but not an absolute trust for conversion. The principle of *Brown v. Gellatly* was that the testator intended his ships to be sold, sooner or later, and the question was what was to be done with the intermediate profits. Here the will is full of indications of a contrary intention. Lady Scarlett's separate life estate is without restraint on anticipation; the ultimate gifts are "according to the respective nature and quality of the said premises," and "according to the nature

(1) 14 Beav., 72.

(2) 7 Ves., 89.

(3) Ibid., 137.

(4) 1 Y. & C. Ch., 812.

(5) 5 De G. & Sm., 723.

(6) 29 Beav., 171.

(7) Law Rep., 2 Ch., 751, 758.

(8) Select Ca. Ch., 61.

(9) 4 My. & Cr., 289.

and quality thereof;" portions and maintenance money are to be "raised and paid out of my said real and personal 402] estates *respectively;" the sums, if any, to be appointed for Charlotte's husband are to be any part not exceeding one-half of the "rents, issues and profits;" the trustees have power to "levy and raise" for advancement; and, until "my said real and personal estate shall become vested," pay and apply parts of the "income and annual produce" of the moieties for maintenance. Finally, the trustees have a discretionary power either to sell and convert, "or" to mortgage.

Indications against an intention to convert were found in *Alcock v. Slopers* ('); *Bethune v. Kennedy* ('); *Daniel v. Warren* ('); *Bowden v. Bowden* ('); *Burton v. Mount* ('); *Simpson v. Lester* ('). The latter case established that the court looks at a direction to sell at a particular time, or for a particular purpose only, as excluding the operation of the rule. The use of the word "rents" was considered enough in *Goodenough v. Tremamondo* ('); when the will was silent, in *Hinves v. Hinves* ('); *Cafe v. Bent* ('); *Crowe v. Crisford* ('); *Green v. Britten* (').

In *Brown v. Gellally* (') a primary trust to convert was assumed throughout; so in *Morgan v. Morgan* (') and in *Re Llewellyn's Trust* ('); if there be an absolute trust to convert, *cadit quæstio*. In *Meyer v. Simonsen* (') there was a gift of residue *en masse*, but no direction as to management or enjoyment.

The court will also keep in view the laches of the plaintiff, who came of age in 1847, and has stood by for twenty-five years; *Acheson v. Fair* ('); *Clegg v. Edmonson* (').

Mr. Kay, Q.C., and Mr. Cecil Russell, for Mr. and Mrs. Thursby: Mrs. Thursby is tenant for life, not to her separate use; Mr. Thursby is trustee and executor; and Mrs. Thursby is administratrix during lunacy of the estate of the other tenant for life, who is administratrix of the other trustee.

403] *The plaintiff does not seek a sale; he does not ask the court to put a stop to the business—will the court give him profits made before the filing of the bill?

(1) 2 My. & K., 699.

(2) 1 My. & Cr., 114.

(3) 2 Y. & C. Ch., 290.

(4) 17 Sim., 65.

(5) 2 De G. & Sm., 383.

(6) 4 Jur. (N.S.), 1269.

(7) 2 Beav., 512.

(8) 3 Hare, 609.

(9) 5 Hare, 24.

(10) 17 Beav., 507.

(11) 1 D., J. & S., 649.

(12) Law Rep., 2 Ch., 751.

(13) 14 Beav., 72.

(14) 29 Ibid., 171.

(15) 5 D., G. & Sm., 723.

(16) 3 D. & War., 512.

(17) 8 D., M. & G., 787.

As for the rule in *Howe v. Lord Dartmouth* (¹), the courts have always leaned against it; they have applied it unwillingly; and it will yield readily to evidence of a contrary intention. Here the testator has bequeathed all his "leasehold estates" as a separate class of his property. In many cases the test has been, Had the testator any leaseholds? If so, it has been held that the word "rents" can only be satisfied by enjoyment in specie. Again, if any part of a wasting property is to be retained in specie, the whole must be retained. Now, there is no direction at all to convert the leaseholds; there is a power to convert, and no more. A case cannot be found in which, where a testator, having leaseholds, gives a power to lease those leaseholds, the tenant for life is not to enjoy in specie. It has been said that this power of leasing will not apply to mines. But it has been held otherwise from early times: *Campbell v. Leach* (²); *Daly v. Beckett* (³); Sugden on Powers (⁴); *Clegg v. Rowland* (⁵). It is not arguable that this power does not include the leaseholds, that is to say, the leasehold mines. Why were the tenants for life made dispunishable of waste? Suppose the trustees had let the leasehold mines, taking the rents, what possible claim could the plaintiff have had to any part of those rents? Where is the direction to capitalize the rents? Why should the testator give Mrs. Thursby an estate, not for her separate use, and then make Mr. Thursby, who thus became the beneficiary, his trustee, if not that the tenants for life were to enjoy in specie? And to this very person he gives the power of leasing. The clause about continuing the business must be read with the power of leasing; and if the rents of the mines would have been a part of the income to which the tenant for life was entitled, why not the actual profits for which those rents would have been a substitute?

Did the testator intend that the tenant for life was not to take profits, when he has thrown upon him not only losses, but the *costs of working, such as sinking a shaft? [404] Was a tenant for life to make such an outlay, and not take the profits? Why should he give the trustees the power to use all his real and personal estate for the purpose of extending the works?

In *Brown v. Gellatly* (⁶) the words were, for the benefit "of my estate." No such words occur here.

If the plaintiff seeks his strict right, we may say—"You

(¹) 7 Ves., 137.

(²) Amb., 740.

(³) 24 Beav., 114.

(⁴) 8th ed., p. 735.

(⁵) Law Rep., 2 Eq., 160.

(⁶) Law Rep., 2 Ch., 751.

shall have your right; undo all that has been done, but if you do that, you must at the same time renounce all the benefit of what you say is your trustee's wrongdoing. We submit to treat the mines, as they stand, with the plant, as part of the trust estate; but we must use every weapon of defence; and if you come, the answer is, you come too late."

Mr. *W. Pearson*, Q.C., and Mr. *Townsend*, for the representatives of Legh.

Mr. *Southgate*, in reply: [He dealt with the cases, and further cited *Craig v. Wheeler* (') and *Blann v. Bell* (*).]

The expression "according to the respective nature and qualities" merely refers to the two classes of representatives. The word "rents" here is satisfied by the fact that the testator had freeholds. The testator did not make Mr. Thursby his sole trustee. No issue of laches or acquiescence is raised by the pleadings: and a remainderman, who is not a trustee, may come when he pleases.

Without denying the authority of the cases as to the leasing power extending to mines, can that be used as evidence of intention? Would the whole proceeds of such a lease have gone to the tenant for life? That is the whole question. Was the plant to have been leased? If so, it would have been worn out at the end of the term. The framers of this will did not intend the leasing power to extend to the mines and plant; if they did intend it, why did they not say so?

The testator has not said that all the profits shall be given to the tenant for life, and the losses, if any, borne by the 405] remainderman. *Suppose a calamity like the firing or drowning out of a mine to occur, could the remainderman have called on the tenant for life to make it good? If the defendants' contention is right, the trustees might have sold the freeholds and laid out the proceeds in mines.

Mr. *Jackson*, in reply on *Craig v. Wheeler* (') and *Blann v. Bell* (*).

March 3. SIR JAMES BACON, V.C.: The question in this case is in its nature of the simplest kind. I do not mean that the solution of it is wholly free from difficulty, or that the copious materials which have been submitted to the court in the shape of statement on the record, or in the arguments at the bar, have been superfluous or longer than the interest of the parties may have required, but having given the fullest consideration to all that has been pleaded, and proved, and debated, I find that there is but one question to be decided, and that depending wholly upon the true construction of the will of the testator. That duty, then, of

(') 29 L. J. (Ch.), 374.

(*) 2 D., M. & G., 775.

construing the will devolving upon the court, I have now to discharge it. The single question arising upon that will is this: Has the testator so disposed of his whole property as to entitle the persons to whom he gave life interests in that property to possess and enjoy it in the same manner as it was possessed and enjoyed by him up to his death, or does the rule of this court, which constitutes the law, require that, as to a very important part of that property, the right of the tenants for life should be restricted, and that the amount and value of what they have received and may receive must be very sensibly diminished? That the pecuniary value of the subject in dispute is considerable, cannot, I need not say, affect the decision. The law is and must be the same in all cases, and in all cases like the present the first and most important consideration is the intention of the testator as it is expressed in and of necessity to be gathered from the terms of the will. In investigating that subject the greatest circumspection and caution are indispensable.

*[His honor described the terms of the will, the state [406 of the family, the claims of the parties, and the constitution of the suit, and continued:]

There being no material fact in dispute between the parties, the plaintiff's counsel have argued that he is entitled to the relief he seeks.

Among many authorities to which they have referred, the most prominent, and that most relied on, is *Howe v. Lord Dartmouth* ⁽¹⁾, from which it may be gathered as a rule, though not thence for the first time, that where the will does not contain any direction by the testator that his estate shall be converted, and does contain a gift not specific of a subject in its nature perishable, the court will cause the estate to be converted and invested, so that tenants for life may receive the income during their lives, and the persons entitled in remainder may enjoy the investment after them. And that this is the universal, well-established rule in all cases to which, upon the true construction of the will, it is applicable, cannot be questioned. But it is not less clearly established that neither this nor any other rule can be resorted to which would be at variance with the intention of the testator. In *Howe v. Lord Dartmouth* there was no intention expressed in the will, which contained only a general bequest of personal estate. A part of the property so generally bequeathed consisted of long annuities and bank

⁽¹⁾ 7 Ves., 137.

stock, the one of a nature subject to exhaustion by lapse of time, the other exposed to the incidents and hazards of a trading company. There was no direction to the executors to convert. The court could find nothing in the will there but an intention that the property should be enjoyed by the persons named, in succession. To effectuate this intention, to secure a present interest for the tenants for life, and at the same time not to leave the persons entitled in succession without the right to succeed to that which the testator had described and dealt with as one entire subject—however various might be the particulars of which it was composed, the court thought it right to direct the conversion of the long annuities and the bank stock, merely because that was the only way in which the intention of the testator could be fulfilled.

407] *Among the cases cited on behalf of the plaintiff, *Morgan v. Morgan* (') was much relied on. In that case a testator made a general bequest of his personal estate and effects whatsoever and wheresoever to trustees, upon trust to pay his debts and legacies—which general estate, and the interest, dividends, and annual proceeds arising therefrom, he directed that his executors should stand possessed of upon the trusts afterwards declared. He then gave specifically a certain real estate to be enjoyed by his wife for her life, directed it to be sold after her death, and then directed the proceeds of the sale and all the personal estate therein-before bequeathed to be divided equally between his children. A general decree for administration was made, by which a small sum of long annuities was ordered to be paid into court, and under which some leasehold parts of the estate were sold. The question before the Master of the Rolls arose upon a claim made by the widow to retain the rents of the leaseholds which had been received by her up to the time when they were sold, and to enjoy the leaseholds and the long annuities in specie for her life. The Master of the Rolls in deciding that case referred to the rule in *Howe v. Lord Dartmouth* ('), and noticing that the effect of the later authorities had been to allow small indications of intention to prevent the application of the rule, said ('): "The question here is one of construction whether the testator has, in this will, expressed his intention that this rule shall not apply to this particular case." And he decided that the widow was not entitled to the leaseholds and the long annuities in specie. But that he did this upon the rule in *Howe v. Lord Dartmouth* is apparent; for, referring to portions of the

(') 14 Beav., 72.

(') 7 Ves., 137.

(') 14 Beav., 82.

will, he says expressly ⁽¹⁾: "The rest of the will confirms my opinion that the testator had not supposed the whole of his property was to remain unconverted:" for that it would be the duty of the executor to sell some part of his estate to pay his debts and legacies; and he says, "If a part was to be sold, why not the whole?" And referring to the executors' power to vary securities, he thought that inconsistent with any intention by the testator that his widow should enjoy the long annuities in specie, since, as *his [408 executors might have lawfully sold the annuities, such intention would, if they had done so, been defeated.

It had been decided in *Gibson v. Bott* ⁽²⁾, that where the will contained a direction to convert, all intention that the legatee for life should enjoy in specie was dispelled. And indeed it is difficult to conceive a case in which any other conclusion could be arrived at. Certainly in none of the cases referred to has there been any decision in favor of enjoyment in specie, where there has been a direction to convert. And this makes it unnecessary for me to refer more particularly (with one exception) to the other cases which have been cited for the plaintiff, although I have not failed to consider each of them. They were principally *Caldecott v. Caldecott* ⁽³⁾; *Meyer v. Simonsen* ⁽⁴⁾; *Re Llewellyn's Trusts* ⁽⁵⁾.

Nor does the case of *Brown v. Gellatly* ⁽⁶⁾, which is the exception I have mentioned, furnish an example to the contrary. Of all the authorities referred to by the plaintiff's counsel, this was that upon which they most strongly relied, and which, as they argued, was a decision directly supporting their contention. In that case the testator left all his property, personal or freehold, of whatever description, to his executors, giving them "full power to realize the same when and in such manner as they may see fit without being personally responsible for such realization, to sail my ships for the benefit of my estate until they can be satisfactorily sold, and, without being responsible for any loss on any voyage, to sell the ships by public or private sale" for the purposes mentioned in the will, which then proceeded to give life interests and other interests in various parts of the property thus bequeathed as an entire and substantive thing.

An argument was raised on behalf of the tenants for life of the testator's residuary estate, who claimed to be entitled

⁽¹⁾ 14 Beav., 84.

⁽²⁾ 7 Ves., 89.

⁽³⁾ 1 Y. & C. Ch., 312.

⁽⁴⁾ 5 De G. & Sm., 723.

⁽⁵⁾ 29 Beav., 171.

⁽⁶⁾ Law Rep., 2 Ch., 751.

to the earnings of the ships for so long as the sale of them should be postponed. Now, the decision pronounced by the present Lord Chancellor went directly to the point; and I need not say that it is to be regarded as not only a clear, but an 409] authoritative and *binding exposition of the law upon the subject then before him. His Lordship, referring to the case of *Green v. Britten* (1), in which the executors had been, in express terms, prohibited from converting certain ships there mentioned for seven years, and where, therefore, the court held that to be a sufficient warrant for giving to the tenant for life the income which the ships earned during the seven years, said that the principle on which the court there proceeded did not apply to the case before him, in which he found no indication whatever of an intention that the ships were to remain unconverted for any specific time. The decision, therefore, was that a value must be set upon the ships as at the death of the testator, and the tenant for life must have 4 per cent. on such value, and the residue of such property must, of course, be invested, and become part of the estate.

I am wholly unable to perceive how this decision, clear and distinct as it is in its terms, and irrefragable in the principles on which it proceeds, can support or assist the plaintiff's contention. It is a decision upon the construction of the will—it is founded upon the will, and upon the intention of the testator expressed in the will. The conversion of the entire estate is stated and treated in the judgment as a duty incumbent on the executors: the period of the conversion of so much of the estate as consisted of the ships is postponed for obvious reasons—to sell them at once would, in the testator's opinion, be disadvantageous; to keep them unemployed would, perhaps, having regard to the nature of the subject, be injurious, would certainly be expensive—to sail them until a suitable opportunity for selling them should arise, was the proper mode of managing this description of property, and directions to that end are therefore given, but given in such a manner as does not sever the ships and their earnings from the bulk of the estate, for they are to be sailed "for the benefit of my estate." No notion of the rule in *Hove v. Lord Dartmouth* (2) seems to have been entertained by the Lord Chancellor (the case does not appear from the report to have been referred to in the argument), but the decision proceeded upon the plain words of the will, by which the interest of the tenant for life was no more than the income of the estate, which estate was to be augmented by the

(1) 1 D., J. & S., 649.

(2) 7 Ves., 137.

earnings *of the ships until the executors should add [410 those earnings, together with the proceeds of the sale when they thought fit to make it, to the aggregate amount of the general estate. Unless, therefore, it can be held that, upon the true construction of the present will, there is to be found a general direction, or an unequivocal intention, on the part of the testator, that his personal estate unconverted at his death should be converted, the case of *Brown v. Gellatly* (*) does not appear to me to furnish any authority in support of the plaintiff's contention. Whether any such intention can be collected from the will itself is the matter to be considered.

In almost all—if not in all—the cases in which the point has arisen since the decision in *Howe v. Lord Dartmouth* (*), the court, keeping in view the rule there applied, and not intending to question or depart from it, has held that it cannot be resorted to if there can be found in the will any indications of a contrary intention; and this latter principle is not less generally recognized, nor less firmly established, than the rule referred to. On the part of the defendants, reference has been made to many cases in which the construction of wills, and the interests of tenants for life, and persons entitled in succession, being in question, the court has been enabled to avoid the application of the rule. In *Alcock v. Slopers* (*), where the testator had given the residue of his real and personal estate to trustees upon trust to permit his wife “to receive the rents, profits, dividends, and annual proceeds thereof” for life, and had directed the trustees from and immediately after her decease to sell his freehold and leasehold houses by auction, desiring that a person named be employed as auctioneer, “to convert the whole of my estate and effects into money, and to distribute the same in equal shares,” it was held by Sir John Leach that the widow was entitled, during her life, to the enjoyment of a part of the testator's estate, consisting of long annuities. The Master of the Rolls, adopting the principle to which I have referred, although he fully recognized the rule and the authority of *Howe v. Lord Dartmouth*, and the intention which had there been imputed to the testator, said (*): “Although this intention of the *testator is *prima facie* to be inferred, [411 it may plainly appear upon the whole context of the will that the testator had not that meaning, but that his intention was that the tenant for life should derive the same income from the residuary estate as he had himself derived from his property up to the period of his death.”

(1) Law Rep., 2 Ch., 751.

(2) 7 Ves., 137.

(3) 2 My. & K., 699.

(4) Ibid., 702.

In *Bethune v. Kennedy* ⁽¹⁾ Sir C. Pepys, in dealing with the case which, as he says, was distinguishable from *Alcock v. Sloper* ⁽²⁾, and which was in its facts by no means similar to the present, being, nevertheless, a question between tenant for life and the persons entitled in succession, said: "The question is plainly one of intention, to be collected from a careful examination of the whole scope and context of the instrument; and so it has always been considered."

In *Pickering v. Pickering* ⁽³⁾ the same judge had to deal with a similar question, arising, however, out of much more complicated circumstances, into which it is not for the present purpose necessary to enter. The value of the case, however, is that it contains an exposition of the principles which ought to guide courts of equity in dealing with such questions.

In *Burton v. Mount* ⁽⁴⁾ the testator's estate, consisting partly of leasehold estates and long annuities, had been bequeathed upon trust to pay the rents and profits, dividends and interest, to a tenant for life, with trusts in remainder, and with power to the trustees to sell as they should think fit. The Vice-Chancellor Knight Bruce ⁽⁵⁾, observing that the will in that case differed from each of the wills considered in the cases of *Alcock v. Sloper*, *Collins v. Collins* ⁽⁶⁾, *Bethune v. Kennedy*, and *Pickering v. Pickering*, said: "The question is not upon the letter, however, but upon the spirit; the question is, whether, looking at those four cases together, they do not, in spirit, give a rule of construction, within the influence of which the present will does, as to the long annuities, fall; and I think they do." He declined to act on what, he said, would probably have been his own opinion independently of authority, as to the long annuities—because he should be contradicting those decisions in their 412] spirit. He therefore decided *the point, as to the long annuities as well as the leaseholds, in favor of the tenant for life.

In *Hinves v. Hinves* ⁽⁷⁾ the Vice-Chancellor Wigram comments upon and explains the law, as it has been decided in *Howe v. Lord Dartmouth* ⁽⁸⁾ and in *Pickering v. Pickering* ⁽⁹⁾, and says: "But, if the will expresses an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule does not apply. The rule is settled with sufficient

⁽¹⁾ 1 My. & Cr., 114.

⁽²⁾ 2 My. & K., 699.

⁽³⁾ 4 My. & Cr., 289.

⁽⁴⁾ 2 De G. & Sm., 383.

⁽⁵⁾ Ibid., 388.

⁽⁶⁾ 2 My. & K., 703.

⁽⁷⁾ 3 Hare, 609, 611, 612, 613.

⁽⁸⁾ 7 Ves., 137.

clearness ; the difficulty arises only in its application to particular cases, where the intention of the testator is expressed with more or less distinctness." He says, further, that "in the more modern cases, the court, in applying the rule, has leant against conversion as strongly as is consistent with the supposition that the rule itself is well founded." After examining those modern cases to which he had referred, and observing that in the case before him the gift was of the testator's property generally—no specification of particulars—and the property thus generally described was to go to persons in succession, he says: "Stopping here, there is no doubt that the rule of the court would require conversion ; and the inquiry must be, whether, in the directions he has given for the enjoyment of his property by the *cestuis que trust*, or in the management by his trustees, there is anything which a conversion of it at his death would defeat." And, having pursued a minute and critical examination of the language of the will, he came to the conclusion that he could not hold that the long annuities and the leaseholds (the subject of the suit before him) were not to be enjoyed in specie, without in effect deciding against the cases to which he had referred.

There have been several other cases in which the law as decided in that I have last mentioned has been adopted. Several of them have been referred to in the course of the argument ; but it does not appear to me to be necessary that I should mention them more particularly, for in none of them are the rules of law, and the principles upon which those rules are to be applied, expressed with greater clearness and force.

*Following, therefore, those rules, and guided by [413 those principles, I proceed to examine the terms of a will made by a man apparently of great wealth, and part of whose property consisted of leaseholds worth more than £17,000, by means of which he had carried on the business of extensive collieries, in which he had laid out more than other £17,000 in the purchase of the chattels by which that business was carried on, from which he had derived a considerable income, which business he was carrying on at the time of his death, and for the continuance of which he carefully provided by the appointment of trustees with very ample powers for that purpose, and for that purpose only. Besides the general devise of all his real estate, he gives all his personal estate, including specifically and by name, his "leaseholds" and his "chattels and credits," to trustees, upon trust as to one-half for his daughter Mrs. Thursby, and as to the other half

for his only other child, Lady Scarlett, for their respective lives, with this difference only, that as to Mrs. Thursby the gift was not to her separate use, but the same moiety was given to her husband for life in case he should survive, while as to Lady Scarlett, then a spinster, trusts for her separate use were declared, with power to her to appoint any part not exceeding one-half of "the rents, issues, and profits, interest, dividends, and annual income" for her husband for life in case he should survive her.

Pausing here for a moment, I see no reason to doubt that the testator has given his leaseholds, and the chattels appurtenant to those leaseholds, to be enjoyed by his daughters in specie, and exactly in the same manner and to the same extent as he had himself enjoyed them. The introduction of trustees cannot alter or affect this bequest, although the reason for their introduction is plainly apparent, not only because of the sex of the legatees, and the circumstance that one of them was then unmarried, but because the enjoyment of the mines in specie would be most conveniently effected, with regard to their interests and to the interests of the persons entitled in succession, by the trustees named. But the intention of the testator appears more plain when it is found that, as to this leasehold property, which did unquestionably comprise the collieries, power is given to the trustees, "in case they shall deem it beneficial so to do, to 4[14] conduct, *carry on, and continue the collieries which I am possessed of, and either to increase or to abridge the business thereof, and all losses, costs, charges, and expenses of carrying on and continuing the said business shall be borne, paid, and defrayed out of my real and personal estate; and also to procure any lease or leases of the said collieries to be renewed to them, and also to continue the business thereof after such renewal." It has been argued for the plaintiff that the expression, "in case they shall deem it beneficial so to do," brings this case within the decision in *Brown v. Gelatly* (¹). In my opinion it can have no such effect, for, as I have said, there was in that case a plain duty incumbent on the executors to convert, and although a provision was given to effect the conversion with such caution as one particular subject required, the delay which might ensue and its fruits were declared to be "for the benefit of my estate." It is, in my opinion, clear that by this provision the testator had no intention of diminishing the extent of that enjoyment by his daughters of all his property which in the previous parts of his will he had conferred upon them. It would, I think, be

(¹) Law Rep., 2 Ch., 751

doing violence to plain words—I had almost said the common sense—to hold otherwise. Not only has he not said so, but the whole context of the will leads to a contrary conclusion. I have, therefore, no doubt that the trustees, in exercising their discretionary power as to these leasehold mines, were to consider what was for the benefit of the owners, tenants for life, of these mines. If the trustees had thought fit to let these mines, as under the leasing power in the will they might have done (for I cannot restrict that power to leases of real estate or to husbandry leases, as I was invited to do, without inserting a qualification not to be found in the will), the tenants for life would have been entitled to the rents reserved upon any such leases. And although I arrive at this conclusion from the legal effect of the terms in the will, it may also be observed that the power of appointment reserved to Lady Scarlett to appoint in favor of a husband expressly mentions “rent” and “profits” as well as all the other income of the trust estate.

If it had been the intention of the testator that his leasehold mines were to be carried on by his trustees so that they might *annually, or periodically, invest the aggregate [415 amount of the profits they made, and pay to the tenants for life the interest of such investments, it might have been expected that in a will which appears not to have been made without legal advice and assistance, there would have been some such provision, or at least some indication of such an intention. It would, no doubt, be unsafe to rest the decision of this case upon the ground of such silence or omission, but it is, nevertheless, a matter not to be disregarded in construing the will, where it is the duty of the court to consider whether or not the whole scope and context of the instrument does express an intention by the testator that the tenants for life should enjoy in specie that property which was his at the date of the will. There are, however, in my opinion, other indications which lead irresistibly to the conclusion that I should be acting in direct contradiction to the intentions of the testator, as they are expressed and indicated by his will, if I were not to hold that, upon the reasonable and true construction, it was not his intention that his daughters should derive the same income from his estate as he had himself derived from his property up to the period of his death. If I did not, I must wholly disregard those directions to the trustees respecting their management of his property, which I find so carefully prescribed by the will. I should be violating the letter, not less than the spirit of the instrument, and should be acting in contradiction to the

1875

Jones v. North.

V.C.B.

authorities I have referred to, and I should be making a will for the testator wholly different from that by which he thought and intended that he had provided for the enjoyment of his property by his daughters during their lives, and for the persons who might become entitled to that property in succession, in the same manner as he had enjoyed and would, if his life had been prolonged, have continued to enjoy it, with all the benefits and advantages that might accrue from that mode of management for which he had carefully provided.

I am of opinion, therefore, that the contention of the plaintiff wholly fails, and that the plaintiff's claim to reduce the extent of the enjoyment by the tenants for life cannot be supported, having regard to the true construction of the will.

The decree contained a declaration that the whole of the collieries acquired by the trustees of the will formed part of 416] the testator's estate: And a declaration *that the tenants for life were and are entitled to receive the rents and profits of the collieries in specie.

Solicitors for the plaintiff: Messrs. *Shaw & Tremellen*.

Solicitors for the defendants: Messrs. *Warry, Robins & Burges*; Messrs. *Barlow, Bowling & Williams*, agents for Messrs. *Artindale & Artindale, Burnley*; Messrs. *Lee & Houseman*.

[Law Reports, 19 Equity Cases, 426.]

V.C.B., Feb. 26, 1875.

426]

*JONES V. NORTH.

[1875 J. 18.]

Injunction—Breach of Contract—Contract not to tender—Parties.

Tenders for the supply of stone having been invited by a corporation, it was agreed between A., B., C., and D., quarry owners, that B. should not tender, that C. and D. should tender above A.'s price, that A. should purchase certain quantities of stone from B., C., and D. at a fixed price, and that B., C., and D. should not supply the corporation with stone during 1875.

The stone was purchased as agreed, by A., but B., in breach of the agreement, sent in a tender, which was accepted:

Held, on demurrer, that the agreement was not void, and that a bill would lie by A. to restrain B. from supplying the corporation directly or indirectly during 1875 with stone, without making the corporation parties.

DEMURRER. The statements in the bill were in effect as follows:

On the 17th of December, 1874, the corporation of Birmingham issued an advertisement inviting tenders for contracts

for the supply of 40,000 tons of stone for macadamising the causeways of the borough. A form of specification of the work required to be performed, together with a form of tender, was also issued. The plaintiff was the owner of the Hailstone Quarry, at Rowley Regis, in *Staffordshire, [427 and his quarry furnished stone fit and proper for the purposes referred to in the specification. The defendants (carrying on business as the Rowley Hall Colliery Company) were the owners of another quarry in the same district, also furnishing stone of a quality available for the purposes of the specification. Messrs. Fitzmaurice & Co. and Palmer & Lee were owners of other quarries in the neighborhood of Birmingham furnishing stone available for the specification. When the specification and form of tender were issued, the price at which tenders should be sent in became a matter of serious moment to the plaintiff, the defendants, and the other two firms. Under these circumstances an arrangement was come to between the plaintiff, the defendants, Fitzmaurice & Co. and Palmer & Lee, that the plaintiff should purchase from the defendants 10,000 tons of stone, and that in consideration of his doing so the defendants should not send in any tender to the Birmingham corporation, nor supply the corporation with any stone during 1875; and that the plaintiff should also purchase from Fitzmaurice & Co. 10,000 tons, and from Palmer & Lee 6,000 tons, and that the plaintiff and the two last mentioned firms should each send in tenders at different prices, the prices named in the plaintiff's tender being the lowest. In accordance with these arrangements the plaintiff entered into contracts with the defendants, and with Fitzmaurice & Co. and Palmer & Lee, to take the above-mentioned quantities of stone, 26,000 tons in all. In this way it was apprehended that the corporation (though not binding themselves to do so by the terms of the specification), would, in all probability, fix upon the lowest tender, and thus the 40,000 tons would be supplied, by the plaintiff, and through him by the contracting firms; the prices as between the plaintiff and the other three firms for the quantities of stone to be furnished by them being so arranged as to secure to each of them a fair share of the profit arising from the supply to the corporation under their specification.

On the footing of the agreement, the plaintiff, on the 30th of December, 1874, sent in a tender to the Birmingham corporation for 40,000 tons of stone.

On the 27th of January, 1875, the plaintiff received a note

from an officer of the corporation that the Public Works 428] Committee *had accepted the offer of the Rowley Hall Company (the defendants) for the supply of stone,—in breach, as the bill alleged, of their contract with the plaintiff, and notwithstanding the said agreements, and the heavy liability which the plaintiff had thereby been induced to bring himself under as well to the defendants as to Fitzmaurice & Co. and Palmer & Lee for the purchase of large quantities of broken stone, the purchase of which was wholly useless, and would, in fact, be a dead loss to the plaintiff unless the agreement between himself and the defendants be duly acted upon and observed.

Under these circumstances the plaintiff had filed his bill against Messrs. North & Wright to restrain them from supplying any rough or broken Rowley ragstone to the Birmingham corporation either directly or indirectly during 1875, and from supplying during such period any other stone or material, or doing any act, whereby the corporation might be supplied with stone in manner and for the purposes required and referred to in and by the specification.

To this bill the defendants had demurred for want of equity.

Mr. *Jackson*, Q.C., and Mr. *E. Ward*, for the demurrer: 1. The bill is demurrable for want of parties, as it seeks to prevent the defendants from carrying out their contract with the corporation not before the court, although the corporation will be seriously prejudiced if that contract be not carried out, and therefore are necessary parties to the suit.

2. The bill is demurrable also for want of equity, as the injunction, if granted, can in no way alter or improve plaintiff's position by giving him the contract with the corporation, and the only result will be to subject the defendants to pecuniary loss and liability with no corresponding benefit to the plaintiff.

3. Admitting the truth of the arrangement between the plaintiff and the other quarry owners, as averred in the bill, the court will not give any assistance to a plaintiff who does not come with clean hands, and seeks to enforce an arrangement which is against public policy, inasmuch as it is a device for compelling the corporation, under the fiction of a public competition, to accept tenders not representing the real market price of the commodity.

429] *Mr. *Kay*, Q.C., and Mr. *Ince*, for the plaintiff, were not called upon.

SIR JAMES BACON, V.C.: There is nothing to justify this demurrer. The case is very plain, and, on one side, at least, a

very honest one. Several gentlemen, who are owners of quarries, agree that they will sell to one of them a quantity of stone, in view of his tendering to the corporation of Birmingham for what the corporation wants, and the present defendants sell by the bought and sold note (which is set out) a quantity of stone to the plaintiff. Upon it being pointed out to the defendants that what is called the bought and sold note does not specify that they shall not supply the corporation of Birmingham, they enter into a written engagement, which becomes part of the contract for the purchase and sale, that they will not supply the corporation during the year 1875. How are they to escape from that contract? Is there any ground on which this court can withhold from the plaintiff the protection to which that contract entitles him? I am aware of none. The grounds which have been argued first of all are that the corporation should be parties. Why? The corporation, whatever the form of the contract between them and the defendants, could not enforce specific performance of it. If the defendants so involved themselves as that they are unable to perform their contract with the corporation, the corporation require no assistance, and are entitled to none from this court, because by an action at law they can at once inflict upon the defendants the penalty which they have most justly incurred by entering into a contract with them totally in violation of the good faith which they owed to the plaintiff. The suggestion that the plaintiff's position would not be bettered by granting the injunction is one to which I cannot listen for a moment. The plaintiff does not ask the court to better his position. All that he asks is that the defendants should not violate their plain contract to the plaintiff's prejudice. What ground of demurrer can there be in that? The last point, which was touched faintly by Mr. Jackson, but enlarged upon by his junior, is, that the plaintiff must come into court with clean hands. *Every- [430] body will admit that cardinal rule, and in my opinion his hands are wholly unpolluted. It is perfectly lawful for the owners of three quarries to agree that they will sell their commodities upon terms suitable to themselves, and which they approve of; and although they know that the purchaser is going to supply, or offer to supply the corporation of Birmingham with the commodity, that does not in the least restrict their right to deal *inter se*, nor does such dealing deserve to be characterized as a conspiracy. There is nothing illegal in the owners of commodities agreeing that they will sell as between themselves at a certain price, leav-

1875

Ex parte Dawes. In re Husband.

C.J.B.

ing one of them to make any other profit that he can. Upon no ground whatever, in my opinion, can this demurrer be sustained, and it must be overruled with costs.

Solicitors: Messrs. *Emmet & Son*, for Messrs. *Sanders & Smith, Birmingham*; Messrs. *Newman, Dale & Stretton*.

[Law Reports, 19 Equity Cases, 438.]

C.J.B., Feb. 22, 1875.

438] **Ex parte* DAWES. *In re* HUSBAND.

Trader Debtor—Execution—Seizure and Sale—Notice of prior Act of Bankruptcy—Execution levied after Sale under prior Execution by the same Creditor—Bankruptcy Act, 1869, ss. 6 (subs. 5), 11, 87, 95.

A creditor issued execution against a trader for a debt above £50. After the goods seized by the sheriff had been sold, the same creditor issued another execution against the debtor for another debt above £50. The goods seized under the second execution were sold, and the money produced by the sale was paid over to the creditor, the sheriff having had no notice within fourteen days from the sale of any bankruptcy petition against the debtor. Afterwards the debtor was adjudicated a bankrupt upon the act of bankruptcy committed by the seizure and sale under the first execution. The money produced by the first sale was not paid to the creditor till after the sale under the second execution:

Held, that, though it was not proved that the creditor had, when the sale took place under the second execution, any actual knowledge that the sale had been made under the first, he must be deemed to have had notice of the proceedings under his own execution, and must therefore refund the money produced by the second execution.

THIS was an appeal from a decision of the judge of the East Stonehouse County Court.

Samuel Husband was a builder at West Looe. On the 3d of September, 1873, J. R. Bishop recovered a judgment against him for £80 18s. 4d., and issued a writ of execution, under which, on the 5th of September, 1873, the sheriff seized some goods of Husband. On the 17th of September the goods were sold, and on the 13th of October the proceeds 439] of the sale were paid by the *sheriff to Bishop. On the 11th of September, 1873, Bishop recovered another judgment against Husband for £96. A writ of execution was issued, under which the sheriff, on the 23d of September, seized other goods of Husband, and sold them on the 29th of September. On the 15th of October the proceeds of this sale, amounting to £33 13s. 4d., were paid by the sheriff to Bishop. On the 21st of October, 1873, a bankruptcy petition was presented against Husband, the act of bankruptcy alleged being the levy by seizure and sale under Bishop's first execution. Husband was adjudicated a bankrupt on

the 5th of November. The judge refused an application made by the trustee for an order that Bishop should refund the £33 13s. 4d. The trustee appealed.

Mr. *Finlay Knight*, for the appellant: Sect. 87 of the act does not give to an execution creditor, who has been paid the fruits of his execution by the sheriff, a statutory title to hold them in every case; his right is liable to be defeated if he had at the time when he levied his execution notice of a prior act of bankruptcy committed by the debtor: Bankruptcy Act, 1869, ss. 11, 95; *Ex parte Villars* (¹); *Ex parte Key* (²); *Slater v. Pinder* (³). Here the creditor must be taken to have had notice of the sale under his own first execution.

Mt. *Doria*, for the creditor: By Sect. 11 of the act the title of the trustee relates back to the completion of the act of bankruptcy upon which the adjudication is made. I contend that in this case the act of bankruptcy under the first execution was not completed till the money was paid to the creditor. I rely also on *Ex parte Villars* as showing that, after a proper payment to the execution creditor by the sheriff more than fourteen days after the sale, the money can under no circumstances be recalled. Sect. 87 contains the whole code of bankruptcy law with respect to the execution creditors of traders where the debt is above £50.

But, at any rate, it must be shown that the creditor had notice of the sale under the first execution, when the sale was made *under the second. Here there is nothing [340 to show that he had such notice, for the money was not paid to him till long after. The sheriff is not the agent of the execution creditor to receive notice of an act of bankruptcy committed by the debtor: *Ramsey v. Eaton* (⁴).

SIR JAMES BACON, C.J.: I think this case comes clearly within the provisions of the statute. The decision in *Ex parte Villars* will by no means bear the construction which Mr. *Doria* has sought to put upon it. No one can dispute that the head-note of the report of *Ex parte Villars* states the plain law on this subject. If an execution creditor, with no notice of any prior act of bankruptcy, levies upon his debtor's goods, and no bankruptcy petition of which the sheriff has notice is presented against the debtor within fourteen days after the sale of the goods seized, the creditor is entitled to the proceeds of the sale in satisfaction of his debt. But what resemblance has that to the case now before me? The law has been established in bankruptcy for many

(¹) Law Rep., 9 Ch., 482.

(²) Law Rep., 10 Eq., 432.

(³) Law Rep., 6 Ex., 228.

(⁴) 10 M. & W., 22.

1875

Ex parte Dawes. In re Husband.

C.J.B.

years that if an execution creditor has, before he levies his execution, notice of an act of bankruptcy committed by his debtor, he cannot maintain his execution as against the other creditors. That provision is re-enacted by the statute now in force. But to what end should notice of the act of bankruptcy have been given to the execution creditor in the present case? The notice could only have been this: You yourself have done that which constitutes the act of bankruptcy. A man requires no notice of that which he has done himself. It would be absurd to give it to him. Here the execution creditor can properly retain the proceeds of his first execution. But when, having sold the debtor's goods under the first execution on the 17th of September, he on the 23d of September seized other goods of the debtor under the second execution for a debt of more than £50, he must have done so with notice of the prior act of bankruptcy, and the fruits of his second execution cannot be retained as against the other creditors. Sect. 11 of the act must be read with reference to the preceding sections, and by sect. 6, sub-sect. 5, the levy by seizure and sale of an [341] execution for a debt *of £50 is the completion of an act of bankruptcy. The question is whether a creditor who had notice of a prior act of bankruptcy can retain the proceeds of his execution against the other creditors. That he should be able to do so would be against the spirit of the bankrupt law, as well as contrary to the very words of the act. The order of the County Court must be reversed, and the money arising from the second execution must be refunded.

Solicitor for the trustee: *Mr. G. H. Radford*, agent for Messrs. *Greenway & Adams*, Plymouth.

Solicitors for the creditor: Messrs. *R. W. Childs & Batten*, agents for Messrs. *Childs & Son*, Liskeard.

[Law Reports, 19 Equity Cases, 444.]

M.R., Nov. 21, 1874.

In re LONDON AND PARIS BANKING CORPORATION. [444]Company—Winding-up—Creditor's Petition—Disputed Debt—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 79, 80.*

The omission of a joint stock company to comply with a statutory notice requiring payment of a debt, served by a creditor on the company under the Companies Act, 1862, s. 80, subs. 1, is not "neglect" within the meaning of that sub-section, unless there is no reasonable cause for the omission.

A creditor who has served such a notice is not entitled to a winding-up order if the company *bona fide* dispute the debt, and there is no evidence of the insolvency of the company (other than the non-compliance with the notice), and insolvency is denied on the part of the company.

Where a creditor whose debt was disputed served such a notice, and at the expiration of three weeks filed a petition to wind up the company under circumstances which, in the opinion of the court, showed that the object of the petition was not to obtain a winding-up order, but to put pressure on the company:

Held, that the petition must be dismissed with costs.

THIS was a petition for a compulsory order to wind up the London and Paris Banking Corporation, Limited, presented by Mr. Zuccani, who claimed to be a creditor of the company for £267 14s.

The petitioner was a furniture dealer, and had supplied furniture and goods for fitting up the offices of the company. The price charged by the petitioner for such furniture and goods was £267 14s.; the directors of the company were unwilling to pay this amount in full, but offered to pay £155. On the 19th of October, 1874, the petitioner caused a demand in writing to be served on the company, under sect. 80 of the Companies Act, 1862, requiring the company to pay the full amount claimed within three weeks. On the following day, the 20th of October, the petitioner commenced an action in the Court of Exchequer for the recovery of the amount claimed. On the 21st of October the company's solicitors tendered to the petitioner's solicitors a sum of £157 6s. in satisfaction of the claim; but the petitioner's solicitors refused to accept this sum, and stated that their client would insist on payment of the full amount. Some correspondence then took place between the solicitors, with the view of having the matter referred to one of the *Masters of the [445 Court; and both sides expressed themselves as willing that this should be done. On the 29th of October the declaration in the action was delivered. On the 3d of November the company's solicitors took out a summons to refer the matters in dispute to a Master; but the petitioner's solicitors

1874

In re London and Paris Banking Corporation.

M.R.

having shown an intention of opposing the application, the company afterwards abandoned it. The company ought in due course to have pleaded in the action on the 5th of November, but they obtained an extension of time for pleading until the 12th of that month. On the 11th of November the present petition was presented. On the 12th of November the company (having in the meantime obtained the report of two valuers on the value of the furniture and goods) paid into the Court of Exchequer the sum of £197; and on the same day the company pleaded in the action.

The petition now came on to be heard. There was no evidence (independently of the non-compliance with the statutory demand) of the insolvency of the company; and the secretary of the company had made an affidavit that it was solvent.

Mr. Oswald (Mr. Southgate, Q.C., with him), for the petitioner, submitted that the petitioner had a clear statutory right to a winding-up order: *Bowes v. Hope Mutual Life Insurance Company* (1); *In re Western of Canada Oil, Lands, and Works Company* (2).

Mr. Bagshawe, Q.C., and Mr. Dundas Gardiner, for the company, were not called upon.

SIR G. JESSEL, M.R.: The first question to be considered in this case is, What is the law on the subject? It has been asserted on the part of the petitioner that there is a statutory right to a winding-up order given by the 80th section of the Companies Act, 1862, to any creditor who has given the statutory notice if non-payment has occurred by the company for a space of three weeks. Now, first of all, what does the statute say? It says that whenever a creditor to whom a company is indebted in a sum exceeding £50 has 446] *served on the company in a certain way a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum or to secure or compound for the same to the reasonable satisfaction of the creditor, then the company shall be deemed to be unable to pay its debts. It is very obvious, on reading that enactment, that the word "neglected" is not necessarily equivalent to the word "omitted." Negligence is a term which is well known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. Therefore I should hold,

(1) 11 H. L. C., 389.

(2) Law Rep., 17 Eq., 1.

upon the words of the statute, that where a debt is *bona fide* disputed by the debtor and the debtor, alleges, for example, that the demand for goods sold and delivered is excessive, and says that he, the debtor, is willing to pay such sum as he is either advised by competent valuers to pay, or as he himself considers a fair sum for the goods, then in that case he has not neglected to pay, and is not within the wording of the statute.

It is next to be considered whether there is any authority on the subject; and it is satisfactory to me to find that the more recent authorities adopt the view which I have expressed. It is true that something occurred in the case of *Ex parte Rhydydefed Colliery Company* ⁽¹⁾, which seems to show that the Lord Justices did not hold that view. In a subsequent case, *Re Catholic Publishing and Bookselling Company* ⁽²⁾, which was heard in 1884, Lord Justice Knight Bruce was of opinion that the petition ought to be dismissed on two grounds: first, that it was not proved to his satisfaction that the petitioners were creditors of the company; and secondly, that assuming that they were, they had not shown a case for winding up the company. Lord Justice Turner concurred in the opinion that the petition ought to be dismissed, but only on the second ground given by Lord Justice Knight Bruce, viz., that the proper time after service of the demand had not elapsed; and then he added these words: "Where there is a *bona fide* dispute as to the existence of the debt, and the case turns upon the question whether there is a debt, I think the *court will do well to exercise the power [447 given it by the 86th section of the act to adjourn the petition till the existence of the debt is established." That seems to be a *dictum* only. The matter, however, does not stop there. The exact point came before Lord Romilly again in the case of *Re Brighton Club and Norfolk Hotel Company* ⁽³⁾. In that case, the builder who had built the hotel—and I suppose a man who builds an hotel is in quite as favorable a position as a man who furnishes an office—served the company with a statutory notice to pay him a balance of £3,854 claimed by him. The company did not pay, and at the expiration of three weeks he presented a petition for winding up the company. The claim was disputed by the company. It was admitted that more than £50 was due to the petitioner, but no tender was made. The counsel for the petition contended that there being a clear debt of above £50, and a default (they used this word instead of the word in the statute, which is "neglect") for

⁽¹⁾ 3 De G. & J., 80.

⁽²⁾ 2 D., J. & S., 116.

⁽³⁾ 35 Beav., 204.

more than three weeks after demand for payment, there ought to be an order, or that, at all events, the petition ought to stand over until the petitioner had either substantiated his claim, or had failed in doing so. The Master of the Rolls, without calling upon the respondents, said ('): "This is a novel experiment, and if I acceded to the application the consequence would be very serious to public companies. The meaning of the act is this—if a debt above £50, which is not *bona fide* contested, be not paid or arranged within three weeks after demand, the court may order the company to be wound up. It is not sufficient for a company to say 'We dispute the debt;' they must show some reasonable ground for doing so. This is a *bona fide* contested debt, and though more than £50 appears to be due, I do not think that it is such a case as was intended by the act . . . The whole of the evidence which has been laid before me clearly establishes that this is a contested question of account between the company and the petitioner, although something is due to him which would exceed the £50 mentioned by the statute. This, however, is not the case within the statute: for what should I have to do if I made the order? I could do nothing but take an account between these parties. If I made the order, I should still say to the company, Provided 448] you pay *what is due to the petitioner, I will stop the proceeding." He then dismissed the petition with costs. The same learned judge gave a similar decision in *Re London Wharfing and Warehousing Company* (*). Although there may have been a difference, or apparent difference, of opinion between the Lords Justices Knight Bruce and Turner, I believe the courts below have invariably acted on what, as I understand, was the opinion of Lord Justice Knight Bruce; and I should be bound by authority (even if I entertained a different opinion, which I do not) to hold that if the debt is *bona fide* contested, and there is no evidence other than non-compliance with the statutory notice to show that the company is insolvent, and the company denies its insolvency (as this company does), I ought to dismiss the petition. I must say, however, that the facts of this case go far beyond what I have stated, and are such as to convince me that this petition has not been presented *bona fide*—that is, not with the view of obtaining a winding-up order, but with the object of extorting from the company a larger sum than they thought was fairly due, under pressure of a threat to present the winding-up petition.

(') 35 Beav., 205.

(*) 35 Beav., 37.

[His honor then stated the facts to the effect set forth above, and continued:]

That being the position of matters, on the 11th of November the petitioner thinks it right to present the petition. I cannot treat that as a *bona fide* attempt on the part of the petitioner to wind up the company. Obviously, if it had any meaning at all, it was to put pressure upon the company, perhaps, by threat of the advertisements, or by some other means, to compel them to pay; in other words, to extort from them a sum larger than they *bona fide* believed to be due from them, and a sum which they had been advised by two valuers was excessive. I cannot encourage any such course of proceeding, and I therefore dismiss the petition with costs.

Solicitors: Messrs. *Crook & Smith*; Messrs. *Innes & Son*.

If one charged with bankruptcy refuse to pay commercial paper from an honest claim of defence thereto, it is not a stoppage or suspension of payment within the bankrupt act. The failure to pay must be for want of means or ability to do so: *Matter of Thompson*, 2 Bissell, 166, 3 Bank. Reg., 185; *Matter of Chandler*, 1 Lowell, 478, 4 Bank. Reg., 213; *Bank v. Iron Co.*, 5 Bank. Reg., 491; *Matter of Westcott*, 6 Ben., 185, 7 Bank. Reg., 285;

Matter of Mannheim, 6 Benedict, 270, 7 Bank. Reg., 342; *McLean v. Brown*, 4 Bank. Reg., 585; *Matter of Hercules Ins. Co.*, 6 Benedict, 35, 6 Bank. Reg., 338.

The party must satisfy the court that he has good reason for disputing his liability, and that there was reasonable doubt to his liability: *Matter of Mann*, 3 Bissell, 442, 7 Bank. Reg., 468; *Matter of Wilson*, 8 Bank. Reg., 396; *Matter of Staptin*, 9 Bank. Reg., 142.

[Law Reports, 19 Equity Cases, 453.]

M.R., Feb. 22, 1875.

*FOX V. LOWNDS.

[453

[1875 F. 1.]

Charity—Mortmain Act (9 Geo. 2, c. 36)—Voluntary Covenant—Impure Personality—Abatement.

A voluntary covenant to secure by will the payment of a sum of money to be applied for charitable purposes cannot be satisfied out of the impure personality of the covenantor; and the debt created by the covenant must, like a legacy, abate in the proportion of the impure to the pure personality.

By an indenture dated the 22d of July, 1859, and made between Ann Tulloch of the first part, and the plaintiffs of the other part, after reciting that Ann Tulloch was desirous of providing funds for a permanent chaplaincy in connection with the infirmary for the counties of Newcastle-upon-Tyne, Durham, and Northumberland, upon the conditions and in manner thereafter expressed, it was wit-

nessed that in pursuance of such desire Ann Tulloch thereby covenanted with the plaintiffs (the intended first trustees) that she the said Ann Tulloch would, during her life, pay to the first and every succeeding chaplain who should be appointed to the infirmary by virtue of the indenture now stated the yearly sum of £100 (in addition to the yearly salary provided by the governors of the infirmary), by two equal half-yearly payments, as therein mentioned : and also would, either by deed to be executed by her in her lifetime, or by her will, well and truly secure to be paid to the said trustees, within three months after her decease at the most, with proper trusts for investment, such sum or sums of money as should thenceforth be sufficient to produce in perpetuity the yearly sum of £130 (in addition to such yearly salary provided by the said governors), and that the said yearly sum of £130 should thenceforth be paid to such chaplain as aforesaid in like manner as the said yearly sum of £100, which should then have terminated ; and the indenture contained divers regulations with respect to the appointment of a chaplain.

Ann Tulloch afterwards intermarried with John Blackwell, who died in February, 1872.

Mrs. Blackwell made her will, dated the 29th of November, 1873, and thereby bequeathed to the trustees of the indenture of the 22d of July, 1859, such sum of money as should be deemed sufficient, if invested in government securities, to produce the clear yearly sum of £130 ; and she directed that the trustees of the said indenture should stand possessed of the sum so bequeathed to them upon the trusts declared and contained in the indenture ; and she further directed that no deduction should be made from the said sum for legacy duty, and that the said sum should take precedence of all other pecuniary legacies bequeathed by her ; and she appointed the defendants executors.

Mrs. Blackwell died in September, 1874. During her lifetime she regularly paid the salary of the chaplain to the infirmary ; but she did not pay or secure to the plaintiffs any sum for the purpose of raising the yearly sum of £130 covenanted to be paid by her.

Mrs. Blackwell was, at the dates of the indenture and of her will and at her death, entitled to pure personalty more than sufficient for the payment of the fund covenanted to be provided by her. She was also at her death entitled to realty and impure personalty. The defendants, however, refused to pay the full sum covenanted to be provided by

the testatrix, and this suit was instituted to obtain the opinion of the court as to whether there was or was not to be an abatement.

Mr. *R. Swan* (Mr. *Southgate*, Q.C., with him), for the plaintiffs: No doubt if our case depended on the bequest contained in the will, we should be unable to recover the full amount we claim, and the legacy would have to abate in the proportion of the impure to the pure personalty of the testatrix. But the covenant contained in the deed of the 22d of July, 1859, created a legal obligation, which it was in the power of the testatrix to fulfil by inserting a direction in her will that the legacy given to the trustees of the deed should be paid out of her pure personalty; she has given no such direction, and, consequently, we are entitled to prove against her estate for a breach of that covenant. The other side will, no doubt, rely on *Jeffries v. Alexander* ⁽¹⁾; but in that case the covenantor was not entitled to any pure personalty, *and the covenant was treated as a mere device for evading the provisions of the Mortmain Act. [455

Mr. *Chitty*, Q.C., and Mr. *Williamson*, for the defendants: The case is governed by *Jeffries v. Alexander* ⁽¹⁾, which decides that a voluntary covenant in favor of a charity cannot be satisfied out of the impure personalty of the covenantor. This is quite clear from the judgments of Lord St. Leonards and Lord Kingsdown. Lord St. Leonards says ⁽²⁾: "In my opinion the intention and the true construction of this instrument is, that it is a voluntary settlement of so much as the testator has directed of his personal estate (the nature of which I will presently consider) to be secured by this deed in anticipation of his will. Equity in the case of a bond to settle a certain sum of money does not regard the penalty or the nature of the security, but it looks to the act which was intended to be performed, and therefore the condition of a bond has frequently been considered and acted upon as an agreement for a settlement. Now the act of Parliament expressly strikes at a settlement made in any way, attempting to charge property or to transmit property of the nature of chattels real to a charitable use." Again: "Nobody pretends that it is a charge in the proper sense of charge, but it is, indirectly, a settlement for charitable purposes of that property which he could not directly settle or charge;" and he puts this question, "Does or does not the gift by this deed, as the rule of equity stands, putting it on the highest ground on which you can place it, amount simply to a legacy, a legacy secured or directed by a deed,

⁽¹⁾ 8 H. L. C., 594.

⁽²⁾ 8 H. L. C., 657, 659, 664.

but still a legacy in the creation of it, a legacy in the gift of it, a legacy in the administration of assets for the payment of it, a legacy in all characters and qualities that it can possibly have?" Lord Kingsdown also lays it down that though in point of form there was in that case a debt, yet in substance it was a legacy: and being in effect a gift, it could make no difference whether it was made by deed or will. All these observations apply to the present case.

Mr. *Swan*, in reply.

456] *SIR G. JESSEL, M.R.: I am of opinion that the case is really governed by the decision in *Jeffries v. Alexander* ⁽¹⁾. I must consider first of all what is the law on the subject. Now the law on the subject prohibited anybody giving any interest out of real estate, or any moneys to be paid out of real estate, except in the manner pointed out by the statute. That was the law. Has this lady given money to be paid out of her real estate? Upon that there can be no question. This is a voluntary deed; it is therefore a gift, and the money which is claimed by the plaintiffs is to be paid to the extent to which it is questioned out of her real estate. Therefore, if I hold this to be valid, I do enable her to give in an indirect way, money out of her real estate for the benefit of a charity. This is the exact mischief aimed at by the statute, and the case is clearly within the spirit of the statute. Are the words of the enactment sufficient? I see no reason to doubt their sufficiency. Then, is this a gift of something to be paid out of real estate? On that I think the observations of Lord St. Leonards and Lord Kingsdown, in the case of *Jeffries v. Alexander*, are conclusive. This is in effect a covenant by this lady that her executors shall pay; that is what it comes to, though it is in form a covenant that she will, either by deed or will (she did it by will), within three months after her death, secure to be paid money sufficient to raise the annual salary of the chaplain of an infirmary. Any one executing a deed such as that must intend to create a voluntary debt, as it is called, which does not stand in a court of equity in the same position as a debt for value, to be paid after the decease of the person entering into the obligation out of the assets of that person. In what shape or way does that differ from a legacy in this court, which is the court which deals more especially with the administration of assets? It is postponed to all debts for value; it takes, no doubt, a certain priority over legacies, but except in that respect it differs in no way from a legacy. It is, so far as regards the administration of assets,

⁽¹⁾ 8 H. L. C., 594.

in the same position as a legacy, or as it was put in *Jeffries v. Alexander*, it is in the nature of a legacy. Now what is the position of a legacy as regards assets? A man who gives a simple legacy of £100 to *a charity does not [457 give any express directions that it shall be paid out of one class of assets more than another, but he does that which sets the law in motion, and which (when there is no question as to charity) would entitle the legatee to be paid out of his assets generally; and to the extent, therefore, to which real estate or impure personalty would be liable to contribute, to that extent the testator does direct his legacy to be paid out of realty and impure personalty, not by express words, but by the necessary consequence of the gift itself.

Now, as I understand the decision in *Jeffries v. Alexander* (¹), it is quite immaterial whether the direction in the voluntary instrument to pay the charitable provisions out of assets is given in the form of a voluntary deed of covenant or is given by the will itself; the effect is the same; the intention is the same; and the intention is one which the law will not allow to operate. In my opinion, therefore, looking at that authority, the gift must be treated as failing to the extent of the proportion of the impure to the pure personalty.

Solicitors: Messrs. *Williamson, Hill & Co.*, agents for Mr. *J. A. Philipson, Newcastle-upon-Tyne*.

(¹) 8 H. L. C., 594.

See note, 10 Eng. Rep., 781.

[Law Reports, 19 Equity Cases, 462.]

M.R., March 8, 9, 1875.

***PRINTING AND NUMERICAL REGISTERING COMPANY [462
V. SAMPSON.**

[1873 P. 177.]

Patent—Assignment—Covenant to assign future Patents of like Nature—Public Policy.

An agreement by the vendor of a patent to assign to the purchaser all future patent rights which the vendor may hereafter acquire of a like nature to the patent sold, is not contrary to public policy.

In August, 1872, Marcus Bebro, William Ashcroft, and Simeon Sampson (the defendant in this suit) were entitled to seven-eighth shares of letters patent relating to inventions made by Bebro, described as "inventions applicable to the mechanism or apparatus employed for numbering and printing tickets consecutively, and for containing and delivering tickets or continuous lengths of paper, or other similar mate-

1875

Printing and Numerical Registering Company v. Sampson.

M.R.

rials;" and it was intended to form a company with limited liability for the purpose of purchasing and working these patents. Accordingly an agreement in writing, dated the 31st of August, 1872, was entered into between Bebro of the first part, Ashcroft of the second part, the defendant of the third part, and E. Samuelson of the fourth part, whereby the parties of the first three parts (therein called the vendors) agreed immediately after the allotment of shares in the proposed company to deduce a good title to the aforesaid shares in the said patents, and to assign the same to the company, or trustees for the company; and thereupon the company was to pay to the vendors a sum of £48,750 in such shares and at such time and in such manner as thereby provided. The agreement contained the following stipulation: "The vendors shall enter into a covenant with the said company to assign, as and when required by the company or their directors, all future patent rights, or in the nature of patent rights, which they or any of them may hereafter acquire with respect to the aforesaid inventions, or any of them, or any of a like nature in the United Kingdom, or any part thereof, the Channel Islands, the Isle of Man, or all or any part of the continent of Europe."

The proposed company was duly registered and incorporated 463] rated in *December, 1872. The agreement of the 31st of August, 1872, was carried into effect; the purchase-money was paid, and the patents were assigned by the defendant and the other persons entitled thereto; but no covenant to assign future patents was entered into as provided by the agreement.

In February, 1873, the defendant took out a patent for an invention which the directors of the company alleged to be of a like nature with those which were the subject of the agreement of August, 1872; and the directors accordingly required the defendant to assign to the company; but the defendant refused to do so; and thereupon the bill in this suit was filed by the company, seeking to compel the defendant to assign the patent in question, and to execute a deed of covenant to the effect stipulated for by the agreement of the 9th of August, 1872.

The cause now came on to be heard. At the hearing two defences were relied upon: first, that the patent of February, 1873, was not of a like nature to those comprised in the agreement of August, 1872; secondly, that an agreement to assign future patents was against public policy, as tending to discourage inventors. This report is confined to the latter question.

Mr. *Aston*, Q.C., Mr. *Chitty*, Q.C., and Mr. *Bunting*, for the plaintiffs.

Mr. *Southgate*, Q.C., Mr. *Marten*, Q.C., and Mr. *Hamilton Humphreys*, for the defendant.

SIR G. JESSEL, M.R., after discussing the nature of the inventions which were the subject of the agreement of the 31st of August, 1872, continued:

The buyers were about to form a company to work the invention, that means to produce tickets with numbers. That was to be their business. They were to produce and sell a commodity, the object of the invention being to produce that commodity more cheaply than had been done before. It was an old commodity, an old product, but had not been produced in the same manner before. The object of the company, therefore, was to sell the old product at a lower price than the price at which it could be produced by the modes in use before this invention was patented, and *thereby to obtain business. That is the object. Be- [464 ing about to establish that company, and being about to buy the invention, they found the invention not in the exclusive hands of the inventor, but in the hands of himself and his assigns, persons who had acquired by purchase some portion of his patent rights.

Now nothing is better known than this, that when persons have turned their attention to a particular class of invention they are likely to go on and invent, and likely to continuously improve the nature of their invention, and continuously to discover new modes of attaining the end desired. Persons, therefore, who buy patents of inventors are in the habit of protecting themselves from the utter destruction of the value of the thing purchased by bargaining with the seller that he shall not use any new invention of his for producing that product in which they are about to deal at a cheaper rate, because if he were allowed to do so he might, the day after he had sold his patent, produce something which, without being technically an infringement, and without being technically an improvement, might accomplish the desired object in some other way, and utterly destroy the value of that which they had purchased. They, therefore, not unreasonably, and not unusually, make it a part of their bargain that whatever the man discovers of the same kind in the shape of machinery or apparatus which will produce the product in which they are about to deal shall belong to them. They say, "We cannot buy on any other terms, because otherwise we are exposed to the instantaneous, or almost instantaneous, competition of the inventor with the

1875

Printing and Numerical Registering Company v. Sampson.

M.R.

benefit of his previous experience." That, as I said before, is not an unusual, nor is it an unreasonable, bargain. Now the vendors in this case were of two classes. There were the class of inventor and the class of purchaser of inventions, and it is quite reasonable that there being the latter class in the market the purchasing body of persons should say to the vendors, "You shall not buy up any of these inventions to set up against me," otherwise the same evil might arise from purchase as from fresh invention; the vendors being in the trade, or undertaking the trade, or having turned their attention to the trade, might look out next day for a similar patent, for some patent, that is, which produced the same result, and start in trade against the purchaser. It is, therefore, not unreasonable to provide that the vendors shall not 465] even buy any patent except *upon the terms that it shall belong to the purchaser. That is the position of the parties.

Now, it was said on the part of the defendant, that such a contract as that which I have mentioned, a contract by which an inventor agrees to sell what he may invent, or acquire a patent for before he has invented it, is against public policy, and it was said to be against public policy, because it would discourage inventions; that if a man knows that he cannot obtain any pecuniary benefit from his invention, having already received the price for it, he will not invent, or if he does invent will keep it secret, and will not take out a patent. It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further. I do not say there are no other cases to which it

does apply; but I should be sorry to extend it much further. However, I am satisfied there is no reason for so extending it in this case. In the first place, it is assumed that a man will not invent without pecuniary reward. Experience shows us that that must not be taken as an absolute truth. Some of the of the greatest inventions, which have been of the most benefit to mankind, have been invented by persons who have given their inventions freely to the world. Again it is supposed that a man who has obtained money for the future products of his brain will not be ready to produce these products. That must not be assumed. Nothing is more common in intellectual *pursuits than for men [466 to sell beforehand the future intellectual product before it is made, or even conceived. Does any one imagine that it is against public policy for an artist to sell the picture which he has never painted or designed, or for the sculptor to sell the statue, the subject of which is to be hereafter given to him, or for the author to sell the copyright of the book, the title of which is even as yet unknown, or, more than that, that a contributor to a periodical may agree that he will devote himself to the exclusive service of a certain periodical for a given period, for a given reward? These examples are, to my mind, entirely repugnant to the argument that there is any public policy in prohibiting such contracts. On the contrary, public policy is the other way. It encourages the poor, needy, and struggling author or artist. It enables him to pursue his avocations, because people rely upon his honor and good faith, and the ordinary practice of mankind; and it will provide for him the means beforehand which, if the law prohibited such a contract, he could not otherwise obtain. This appears to me to apply as much to a patent invention as to any other subject which the intellect can produce. A man who is a needy and struggling inventor may well agree either for a present payment in money down, or for an annual payment, to put his intellectual gifts at the service of a purchaser. I see, therefore, not only no rule of public policy against it, but a rule of public policy for it, because it may enable such a man in comparative ease and affluence to devote his attention to scientific research, whereas, if such a contract were prohibited he would be compelled to apply himself to some menial or mechanical or lower calling, in order to gain a livelihood. I think, therefore, if the question were to be debated solely on those considerations, such a contract as this could not be deemed against public policy, and I say that because this argument is one which is frequently used, and when it is brought forward deserves,

1875 In re Universal Non-Tariff Fire Ins. Co. Forbes & Co.'s Claim. V.C.M.

as it has received from me on the present occasion, the most attentive consideration.

[His honor then considered the remaining points, and made a decree for the plaintiffs.]

Solicitors: Messrs. *Newman, Dale & Stretton*; Messrs. *Pritchard, Englefield & Co.*

See *Curtis on Patents* (4th ed.), § 194, et seq.; *Nicholson, etc., v. Jenkins*, 14 Wall. 544; *Bunson v. Dodge*, 18 Wallace, 414.

[Law Reports, 19 Equity Cases, 485.]

V.C.M., Jan. 23, 30; Feb. 1, 20, 1875.

485] *In re UNIVERSAL NON-TARIFF FIRE INSURANCE COMPANY.

FORBES & CO.'S CLAIM.

Fire Insurance—Agent of Company—Misdescription of Buildings—Materiality of Misstatement.

A fire insurance was effected in respect of certain property through an agent named Donald, who inspected the premises. One condition of the policy was, that any material misdescription of the property would render the policy void. The buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slate but with tarred felt. The company alleged that Donald was not their agent, but the agent of the insured; and that the misdescription rendered the policy void:

Held, that the misdescription was immaterial, and not sufficient to vitiate the policy; but that if material, it was made by Donald, as the agent of the insurance company, and the insured were not responsible for it.

THIS was an adjourned summons in the winding-up of the Universal Non-Tariff Fire Insurance Company upon a claim carried in by Messrs. Peter Forbes & Co., of Port Dundas, Glasgow, oil refiners, for a loss sustained by the claimants by a fire which occurred in their premises, the subject of a policy issued by the company to the claimants.

The company was incorporated and registered on the 29th of March, 1871. The capital was to be £250,000, divided into 100,000 shares of £2 10s. each; but it appeared from the evidence that no more than 1,119 shares were ever taken. The claimants being desirous of insuring their premises, entered into negotiation with the company through a person named William Donald, who resided at Glasgow, and represented himself to be the agent of the company. A policy was effected with the company to the amount of £1,550, in four separate risks, on the 8th of September, 1871. The fire took place on the 19th of December, 1871, and a claim for damages was delivered to the company for £1,350.

This claim was disputed by the company, and finally an action was commenced by the claimants in the Court of Exchequer against the company on the 24th of February, 1872. The *company appeared, and pleaded various pleas; [486 and the claimants believing that the company were vexatiously defending the action, and having ascertained that only £3,000 of their capital had been subscribed, presented a petition to wind up the company, which petition was ordered to stand over till after the action had been tried. The action was tried at Hertford on the 10th of July, 1872, and a verdict was entered for the plaintiffs for £1,350, subject to a special case and payment into court of £1,000 by the company. The £1,000 was paid into court in the action.

In November, 1872, the company resolved to wind up voluntarily; and in December, 1872, before the special case could be agreed upon, an order was made by this court continuing the liquidation under supervision. An application was then made for leave to proceed with the special case; but this was refused, and the claimants were directed to establish their claim before the Vice-Chancellor; and an order had since been made in the common law action, that the £1,000 should be brought into this court to be dealt with under the order of the Vice-Chancellor.

The present claim was defended by the liquidators, on the following principal grounds: First, that William Donald, of Glasgow, who negotiated the policy between Peter Forbes & Co. and the insurance company, was not the agent of the insurance company but the agent of Forbes & Co.; secondly, that there were misdescriptions and misrepresentations made by the claimants which rendered the policy void.

Some of the witnesses were cross-examined in court.

The evidence on the first point was, that William Donald held various appointments as agent to insurance companies, and described himself as "Insurance agent;" that he solicited risks from all persons, and effected insurances in several offices; the assured paid him their premiums, and received from him their policies of insurance; he received his commission from the company, and not from the assured, who looked upon him as the representative of the company. It appeared that Donald commenced in May, 1871, writing to Jones, who was the general manager of this company, about Forbes & Co.'s risk, and a long correspondence ensued, which demonstrated, as the claimants alleged, that Donald was the agent of the company, and prospectuses and check-books for *the receipt of deposits were sent to him [487 to assist him in getting business for the company.

On the 9th of August Donald wrote to Forbes & Co. for certain particulars, and stated that the company accepted the risk on the terms therein specified, being at the rate of £3 3s. per cent. on the buildings, and 31s. 6d. per cent. on the stock-in-trade.

On the following day, Forbes & Co. wrote to Donald, as "agent of the Universal Non-Tariff Company," showing that they looked upon him as the company's agent and not theirs. Donald himself inspected the buildings, having free access to all parts, and he communicated the particulars to the company.

On the 22d of August, Jones, the manager, sent Donald a deposit receipt book, and wrote to him thus: "Please do not put the company on risk until advised of the acceptance from here." Subsequently the business was completed by Donald, and Forbes & Co. paid him the premium. He sent them the policy, indorsed with his own name as agent, and he afterwards received his commission of 15 per cent. from the company.

The company, on the other hand, denied that Donald acted as their agent. Their evidence was principally that of their manager, E. C. Jones, who stated that he kept a book with a list of the agents of the company, and Donald's name was not entered in that list. He only considered Donald as a correspondent. Another book had been produced, called the "Proposal Book," in which Donald's name was entered as an agent; but Jones alleged that the entry was not made by himself, or by his instructions. He acknowledged, however, that the book was kept for his information. Jones further admitted, that although the company was advertised with a capital of £250,000, as a matter of fact there was not more than £3,000 subscribed.

On the second point, as to misdescription and misrepresentation, it appeared that the first condition of the policy upon which the buildings were insured was in these terms: "Any material misdescription of any of the property proposed to be hereby insured, or of any building or place in which the property to be so insured, is contained, and any misstatement of or omission to state any fact material to be known for estimating the risk, renders the policy void as to the property affected by such misdescription, misstatement, or omission respectively." The buildings 488] were described in *the policy as built of brick and slated. The policy was divided into four separate risks, as applicable to the different buildings. When the fire occurred a high wall, which divided one part of the premises

from another, fell down, and disclosed the fact that the roof of that part of the building which was not burnt consisted of tarred felt, and this was the principal misdescription of which the company complained. This roof could not be seen before the fire took place, and there was no evidence to prove that Forbes & Co. ever knew of the tarred felt roofing when the insurance was effected. Donald went to the premises himself, made his own survey, wrote down all the particulars, and therefore if a mistake was made, it was made, as the claimants allege, by Donald, and not by themselves.

It was also stated by Donald, that Jones, the manager of the company, had gone down to Glasgow and inspected the premises himself, but the inspection of the premises was denied by Jones.

Mr. *Higgins*, Q.C., and Mr. *Langley*, for the claimants, Peter Forbes & Co.: The two questions raised upon this claim are, whether Mr. Donald was the agent of the insurance company; and whether there was any misrepresentation by the claimants of the nature of their premises which would entitle the company to say that the policy has become invalid.

On the first point, we say that the evidence of Donald himself is conclusive; and that all the evidence in the case goes to prove what he states. It was Donald who solicited the claimants to effect a policy with this company. The evidence shows without doubt that Donald was recognized as the agent of the company.

As regards the misdescription of the premises, we have evidence that they were several times carefully inspected by Donald, and nothing was concealed from him. There is no evidence of any statement made by the insured as to the nature of the premises, and therefore there could be no misstatement by them.

Mr. *Glasse*, Q.C., and Mr. *Cookson*, for the liquidator of the company: The evidence as to Donald being the agent does not show that he was the agent of the company, but the agent of the assured. *He was in the habit of ob- [489 taining policies for any persons who wished to effect insurances, and he inspected the premises as the agent of the insured, and gave such information as he was supplied with by Forbes & Co. They were consequently liable for any misdescription that was sent to the company. No doubt he received a commission from the company, but this is usual in all cases where business is introduced to an insurance company. It does not prove that he was the agent of the

company, and there is no evidence to show that the claimants considered him as such.

It has been held in many cases that the representations made by the assured must be strictly in accordance with the terms upon which the policy is granted. In this case the first condition of the policy was, that any material misdescription of any of the property proposed to be insured would render the policy void. The premises were described as roofed with slate, whereas a portion of the roof was of tarred felt, which is of an inflammable nature, and is, of course, a serious misdescription of the premises.

The burthen of proof as to the statements made at the time the policy was effected lies upon the claimants to show that the misrepresentations were not made by them but by the agent, and that they have failed to prove. This principle was laid down in *Parsons v. Bignold* (*). We say that if the misrepresentation was made by Forbes & Co., it would vitiate the contract, and in default of proof to the contrary by Forbes & Co., it must be taken to have gone from them through Donald to the company. The statement in this case was that the buildings were slated; that statement is not borne out, and therefore the policy is vitiated, as was the case in *Newcastle Fire Insurance Company v. Macmorran* (*). The same decision was arrived at in *Anderson v. Fitzgerald* (*), where a person who effected a policy upon his life failed to answer correctly the questions put to him upon his application to the office. In *Hoare v. Bremridge* (*) your honor said, if you were bound to decide the question, you would follow the case of *British Equitable Insurance Company v. Great Western Railway Company* (*), where you had previously [490] decided that withholding a fact from the *knowledge of the insurance company which ought to have been known by them, was a concealment which vitiated the transaction. That was also the decision in *Bates v. Hewitt* (*), and *Macdonald v. Law Union Fire and Life Insurance Society* (*).

There is no evidence to show that Messrs. Forbes & Co. ever stated this roof to be of felt, therefore it must be taken as a statement by them that it was of slate, since it was the duty of any member of the firm in going over the premises with Donald to point out to him that the roof was of felt. You cannot go into the materiality of the misstatement, because it is part of the contract that the buildings are of brick

(*) 15 L. J. (Ch.), 379.

(*) 3 Dow., 255.

(*) 4 H. L. C., 484.

(*) Law Rep., 14 Eq., 522.

(*) 38 L. J. (Ch.), 132, 814.

(*) Law Rep., 2 Q. B., 595.

(*) Law Rep., 9 Q. B., 328.

and slated. The evidence therefore, is of very little importance. It is or it is not in the terms of the contract. If it turns out that the roof is of felt and not of slate, then it is not the contract entered into, and consequently the policy must fail.

Mr. *Higgins*, in reply : Most of the cases cited go upon this principle, that, where there is an express warranty comprised in the contract for a policy, then a variation in the terms of the warranty is fatal, and the materiality of the misdescription would be of no consequence. That was the only ground of the decision in the *Newcastle Fire Insurance Company v. Macmorran* (*). The difference in this case is that we were not called upon to make any representation whatever. Donald says that he went over the premises himself with Townsend, one of the firm of Forbes & Co., and that he had every facility given him for inspecting the premises. It has been argued that the whole case stands upon warranty, and that you cannot go into the question of materiality ; but warranty is not the basis of this contract. The policy says that any material misdescription of the premises shall render the policy void. Then it is imperatively necessary to show the materiality of the misdescription if there is any, and it appears in the result that only a small portion of the premises, which was insured at a value of £200, was roofed with felt, because the premises were divided with respect to the premium paid, and that small building was not burnt. We insisted upon four separate *risks, [49] and this felt-roofed building was one of the separate risks. The question is, whether this misstatement is material, and we say it is not. It is a variation which is of no consequence, such as the variation in the case of *Towle v. National Guardian Insurance Society* (*), which was held not to vitiate the policy, and in *Benham v. United Guarantee and Life Assurance Company* (*). The principle of the law is clearly stated in *Smith's Mercantile Law* (*), showing that if the description of the property be substantially correct, the error is not material ; and *Story on Evidence* (*) confirms that view of the law.

Feb. 20. SIR R. MALINS, V.C : This company was incorporated and registered on the 29th of March, 1871. The capital was to be £250,000, divided into 100,000 shares of £2 10s. each. The company was a failure from the beginning, for it appears from the evidence of Mr. Jones, the

(1) 3 Dow., 255.

(2) 3 Giff., 42.

(3) 7 Ex., 744.

(4) 8th ed, p. 405.

(5) 3d ed., pl. 58, p. 70.

manager, on his cross-examination of the 16th of December, 1873, that no more than 1,119 shares were ever taken, producing a capital of £2,817 10s. (assuming the shares to be paid in full, which they were not), out of which the expenses of forming the company had to be paid; and with this capital they had the boldness—I may say, audacity—to begin the business of fire insurers, and to hold themselves out as a substantial company, with a sufficient capital to meet all demands that could be made upon them. It is plain that this was an imposition practised on the public, for which all the parties concerned in it ought to be answerable. The claimants in this case were in 1871 carrying on business as manufacturing chemists and paraffin oil makers at Port Dundas, Glasgow, and, believing the representations made by this company, they had the misfortune to open negotiations with them for an insurance on their manufactory in the month of May, 1871, which resulted in their effecting a policy with them on the 8th of September following for the sum of £1,550. The insured property was destroyed by an [492] accidental fire on the 23d of December *following, by which the claimants have sworn that property covered by the insurance to the value of £1,350 was destroyed. The claim for this amount was sent to the company in the usual course, and I have no doubt it would have been promptly met if they had been in funds; but the facts I have stated show that they were not in a situation to meet the demand, and the consequence was that, as might have been expected, objections were taken to the validity of the policy, which would not have been thought of if it had not been for the state of poverty and insolvency of the company. It appears from the cross-examination of the same Mr. Jones, the manager, that when the demands of the claimants under the policy ought to have been satisfied, namely, in April, 1872, the balance of the company at their bankers was £20, and that they had the command of between £200 and £300 altogether, though, upon being pressed, he declined to say where it was. The claimants being unable to obtain satisfaction of the demand under the policy, presented a petition to wind up the company on the 20th of March, 1872. That petition came on to be heard before me on the 31st of May following, when it was resisted on the ground that the company disputed their liability under the policy, and therefore the debt upon which it was founded; but they stated, most erroneously, as it now appears, that they were perfectly solvent and able to pay the debt of the petitioners if they proved it. The debt in respect of which the petition was

presented being thus disputed, I ordered the petition to stand over until the petitioners had proved their debt. For the purpose of doing so, they immediately brought an action against the company, which was called on for trial at the Summer Assizes at Hertford on the 10th of July, 1872, but as there was not sufficient time to try the case, a verdict was taken for the petitioners for £1,350, subject to a special case. For some reason, which has not been explained, the judge who tried the case appears to have required the company to pay £1,000 into court, which they accordingly, by some means, did. Before anything further had been done, the company resolved to wind up voluntarily in November, 1872, and another creditor having presented a petition to wind up the company, upon that petition an order to continue the voluntary winding-up under supervision was made *by [493 me in December, 1872. Under this order Messrs. Peter Forbes & Co. have claimed the £1,350, which they say is due to them under the policy, as a debt against the company; and their demand being resisted by the liquidator, I have to decide the question which has been raised as to the validity of the policy. I should state that the premium paid on the policy was at the rate of £3 3s. per cent. on the buildings, and 31s. 6d. per cent. on the stock-in-trade. These, I am informed, are about the largest premiums ever paid, and it may, therefore, have been well supposed by the insured that they paid such to cover all risks. But the liability under the policy was resisted, on the ground that there was such a misdescription of the property insured as to render it void; and that misdescription consists in a statement that the buildings were slated—that is, roofed with slate; while one of them, the still and boiler-house, was roofed with felt. The insured contend that this is not such a misdescription as to vitiate the policy, and that if it could have that effect, it would only do so as to the particular building, to which a liability of £200 only was attached, which they say became unimportant, as that building was not destroyed or affected by the fire. And they also contend that if the misdescription was important it was not made by them, but by Mr. Donald, who was the agent of the company at Glasgow, to inspect the property for the purpose of fixing the amount of the premium, and that he forwarded the description to the company without having been told by them what the roof was, or having made any inquiry of them on the subject. Now as to the materiality of the misdescription, the first condition indorsed upon the policy was as follows: “Any material misdescription of any of the property proposed to be

hereby insured, or of any building or place in which the property to be so insured is contained, and any misstatement of or omission to state any fact material to be known for estimating the risk, renders the policy void as to the property affected by such misdescription, misstatement, or omission respectively."

It is suggested, on the part of the company, that they would have refused the risk if they had known of the felt roof; but I am satisfied they would not have done so, and that a higher premium would not have been required, and I 494] do not, therefore, *consider that it was a material misdescription within the meaning of the first condition of the policy, and I am satisfied that no such defence would have been set up if it had not been for the state of poverty of this company, to which I have already referred.

Several cases were cited by the counsel for the liquidator, for the purpose of justifying the defence. There is no doubt that if a description is in the form of a warranty, or amounting to a warranty, it must be strictly true, or the policy will be void. This is the point decided in the case of *Newcastle Fire Insurance Company v. Macmorran* (*) decided by the House of Lords—that is, by Lord Eldon, and the decision is of the highest authority. That was a case in which the property by the rules of the society was divided into two classes. It was a manufactory, and the insured gave a statement that it was of the class number one, and therefore paid a smaller premium. The courts in Scotland had decided even there in favor of the validity of the policy, but Lord Eldon took the view that it was a warranty; that there was a positive statement that it was of class one, and therefore as the warranty was not borne out, the policy was void. Lord Eldon says (*): "But if the mill was warranted as of the first class, and was really of the second class, the judgment of the court below was truly erroneous; for it is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact." The case of *Parsons v. Bignold* (*) which was cited by Mr. Cookson, and much relied upon, was this: there was a policy on a life for which property was held; certain representations were made in the particulars, which turned out to be untrue, as to the nature of the interest. The representations

(*) 3 Dow., 255.

(*) 3 Dow., 262.

(*) 15 L. J. (Ch.), 379.

were made by the insured to an agent of the office; the agent of the office did not write all the information he got from the insured at the time, but half an hour after the insured had left him; and the question was, whether the representation was made by the *insured or whether there [495] was a mistake made by the agents of the insurers. If the mistake was made by the agents of the insurers, then, of course, the policy was valid; if the misrepresentation was made by the insured himself, then the policy was void. The assured filed a bill in chancery, before Vice-Chancellor Knight Bruce, to have the policy corrected, and in that form of proceeding the burden of proof was upon him to show that the misrepresentation was not made by him, but by the agent of the insured. The agent of the insured was examined, but could not recollect what passed—he could make no positive statement on the subject. Therefore, inasmuch as the burden of proof was on the insured, the plaintiff, Vice-Chancellor Knight Bruce dismissed the bill, inasmuch as he had not discharged himself of the proof which he was bound to give. That was appealed, and came on before Lord Cottenham, who took the same view. Therefore the case failed because the burden of proof being on the plaintiff, he failed to prove that which was essential in that particular form of relief. But it was assumed throughout that if the misrepresentation had been the fault of the agent of the insurance company the policy would have been valid.

The case of *Anderson v. Fitzgerald* ⁽¹⁾ was cited and much commented upon. It is a well-known authority; and that is a case also in which it will be remembered the original Court of Queen's Bench in Ireland and the Exchequer Chamber in Ireland had decided in favor of the validity of the policy. That was reversed by the House of Lords. The case was this: There was a policy on a life, and a proviso in the policy that if any fact which was the basis of the insurance was misstated, the policy should be void. Two questions were asked of the insured: "Have applications been made to any other office to insure? Answer: No. Have any members of the family died of consumption? No." Now both these representations were false; and there being a proviso that any misstatement on the policy of a material fact should vitiate it, it followed, in the judgement of the House of Lords, that the policy was void from the beginning.

Bates v. Hewitt ⁽²⁾ was also cited. That was the case of an *insurance on the ship Georgia. The ship Georgia [496] was well known in all parts of England and elsewhere as

⁽¹⁾ 4 H. L. C., 484.

⁽²⁾ Law Rep., 2 Q. B., 595.

one of the Confederate cruisers. The person who effected the insurance did not state the fact that it was the Georgia, which had been a Confederate cruiser, and having been a Confederate cruiser she was liable to be seized by the Federal Government of America; she was accordingly seized, and the question was, whether the insurers were liable. It was held that they were not, because that was a suppression of a fact most material to be known by the insurers, since they insured against the perils of the sea, whereas this was not a peril of the sea, but a peril of being captured by a government against whose laws she had been engaged. In giving judgment, Lord Chief Justice Cockburn says that which has been said on many other cases, "The party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the insured."

With regard to the roof in this case, whether it was felt covered with tarpaulin or slate in my opinion would have made no difference whatever.

The case of *Macdonald v. Law Union Fire and Life Insurance Society* (1), cited by Mr. Glasse, goes on the same principle. There was a positive statement made with regard to the life, which statement proved to be untrue, and there was a condition in the policy that if any statement was not accurately true the policy should be void.

These authorities do not in my opinion apply to the present case, but the principle applicable to this case is, I think, that stated in Smith's *Mercantile Law* (2), "If the description of the property be substantially correct, and a more accurate statement would not have varied the premium, the error is not material." Amongst the authorities which Mr. Smith cites for that is *Doe v. Laming* (3), where there was a lease granted upon a condition that the property should be kept duly insured. It was insured at common hazard, but 497] there was a condition in the policy that the *premium was to be forfeited if it was used as an inn, and the landlord brought an action of ejectment against the tenant on the ground of a breach of contract to insure. The question turned upon whether the house kept by the tenant was an inn or a coffee house, because if it was an inn the insurance company considered that the trade of an innkeeper was doubly hazardous. Lord Ellenborough said that Grigsby's Coffee House was like any other coffee house, and was not an inn within the meaning of the policy.

(1) Law Rep., 9 Q. B., 328.

(2) 8th ed., p. 405.

(3) 4 Camp., 73.

The case of *Benham v. United Guarantee and Life Assurance Company* ⁽¹⁾ was cited by Mr. Higgins for the claimants. That was a case in which the integrity of a tax collector was to be assured by the society. Amongst the statements was one made as the basis of the insurance that the accounts should be settled every fortnight. They were not so settled, and that was held by the Court of Exchequer not to vitiate the policy. It was not considered as an essential or important condition of the policy, but a mere statement.

The case of *Towle v. National Guardian Insurance Society* ⁽²⁾, before Vice-Chancellor Stuart, was also cited and relied upon by Mr. Higgins.

I had not the book at the time, but when I took up the report I found in a note to the case, "In this case the Lords Justices differed from his honor, and reversed the decree." Therefore I cannot rely upon that for the purpose for which it was cited. But there is a material statement that a tax collector, having to collect more than £9,000 a year, his statement was that he should never have more than £50 in his hands at a time, because he would settle weekly, and therefore divided the amount by 52, whereas at the quarterly collection he frequently had as much as £2,000 or £3,000. That was held to amount to a misstatement which would vitiate the policy.

On these grounds, therefore, I come to the conclusion that there is no such misdescription in the policy as would have the effect of voiding it if it had been made by the insured themselves.

But, assuming this description to be material, I am of opinion it was made by Donald as the agent of the [498 company, and that the insured were not answerable for it.

It was strongly contended by the counsel for the liquidator that Donald was not the agent of the company, but the correspondence between him and Mr. Jones, the manager of the company, completely shows that he was their agent, and this part of the defence was virtually given up. The proposal for the insurance was made by him in a letter dated the 30th of May, 1871, and the correspondence between him and the company was continued down to the date of the policy, and afterwards, and throughout that correspondence he is treated as the agent of the company, and in their books he is stated to be so.

A great number of letters were read on the part of the liquidator. It is not necessary to go through them; but

⁽¹⁾ 7 Ex., 744.

12 ENG. REP.

108

⁽²⁾ 3 Giff., 42.

1875 In re Universal Non-Tariff Fire Ins. Co. Forbes & Co.'s Claim. V.C.M.

there is one dated the the 22d of August, 1871, before the policy was effected, from Mr. Jones, the manager, to Mr. Donald, which conclusively shows that he was the agent of the company. There are several policies mentioned, and of course, therefore, he was writing and was written to as the agent of the office—Peter Forbes & Co. is one of them, the policy now in question. Mr. Jones, the manager in London, writes to Mr. Donald, in Glasgow, "This is accepted, less a reduction of £350 in the third item, making a total of £1,550," which is the amount for which the policy was issued; "please send exactly wording of the policy." Now comes the passage, which I think conclusively shows that they treated him as their agent. "I send deposit receipt book; please do not put the company on risk till advised of its acceptance from here." How could Donald put the company on risk, if he was not their agent? Was he the agent of the company to inspect and describe the property of the insured? Mr. Donald's affidavit of the 25th of April, 1872, contains a statement upon which there has been much cross-examination, and which, in my opinion, has not been in the slightest degree shaken. Mr. Donald, I am bound to say, appears to me to be a man of truth, and straightforward feeling. I cannot say I have the same impression of all the other parties concerned. Mr. Donald, in that affidavit, says: "I solicited the petitioners for business, and 499] ultimately got an offer from them to *insure their building and stock, and I submitted the offer to the defendants on the 30th day of May, 1871. I had a good deal of trouble with the risk, on account of its being a somewhat hazardous one, and the company being particular about the details, I examined the premises several times, and made a sketch of them for the use of the office, at the request of the manager. The company had no surveyor in Glasgow at that time. I acted in the capacity of a surveyor in examining the buildings, making the sketch referred to, and giving the necessary information to the office. I had every access to all parts of the premises, and was furnished by the petitioners with all the information that I wished. I consider that the building, stock, and machinery which I saw was worth from £10,000 to £20,000, and I considered the petitioner's risk the best of its kind I had seen. I have seen every oil refinery in Glasgow. After the said 30th day of May, I received a letter from Mr. Jones, the manager of the said company, to the purport that he was coming to Glasgow. Mr. Jones did come to Glasgow, and he called upon me and had a conversation with me regarding the risk, and gave me to under-

stand that he had come to Glasgow to examine this and other risks, and he then authorized me to give to the petitioners a deposit-receipt for the interim insurance, which I did, upon receiving a deposit." It is sworn by Mr. Donald, that Jones having gone to Glasgow, told him he had been and looked at the place and examined the place insured. Jones says, he never did go to see that place. Why he went to Glasgow, except to do his duty in that way, I cannot see. However, there is the contradiction. Which is correct I cannot tell; but that he told Donald he had been there I have no doubt whatever, for I am satisfied Donald is a man of truth.

Mr. Townsend, who was one of the partners in the firm of Forbes & Co., states that there was no misdescription whatever of the premises, and no omission to state any facts material to be known to the company. That the description was not supplied by the insured but by the agent Donald, after he had repeatedly and carefully inspected the premises, for which inspection all facilities were given by the firm.

I may further remark, that if this company had attached any *importance to the representations made by the [500 insured, it was their duty to have a written statement, whereas from the beginning to the end not one scrap of writing is produced of any statement whatever made by the insured. It is, therefore, in my opinion, a case in which the principles of common sense will apply, where property of this description, upon which forty times the common hazard premium was paid, was insured. They appear to have said, You must send your agent or surveyor to look at the place, and tell us upon what terms you will take the policy. That, in my opinion, was done, and that is the basis of the insurance.

Upon a careful consideration of this evidence, and of the other evidence in the case, I am of opinion that the description of the property was given to the company by Donald, as their agent, and did not proceed from the insured at all, and they are not responsible for the mistake which was made as to the roof, or for any other misdescription of the property.

I am, therefore, of opinion upon the whole, that the insured have established their right to stand as creditors against the company for the damage sustained by the fire, not exceeding the sum of £1,350, which they claimed in the outset, and I am also of opinion that the £1,000 paid into court in the action must be applied in or towards satisfaction of the amount for which they may prove them-

selves to be creditors. I suppose the amount of the loss must be ascertained in chambers if it is disputed. The claimants must have their costs at law and in this court.

Solicitors for the claimants: Messrs. *Flux & Co.*

Solicitors for the liquidator: Messrs. *Wilkins & Blyth.*

Where, at the time of applying for insurance, a paper called in the policy a survey, is filled out by the applicant and delivered to the agent of the insurer, and the policy expressly refers to such survey and makes it a part of the policy, any representation contained therein is to be deemed a warranty: *Ripley v. Aetna, etc.*, 80 N. Y., 136, reversing 29 Barb., 552; *Chase v. Hamilton, etc.*, 20 N. Y., 52; *Brice v. Ins. Co.*, 55 N. Y., 240; *Bank v. Ins. Co.*, 50 N. Y., 45; *Snow v. Ins. Co.*, 48 N. Y., 624; *Le Roy v. Ins. Co.*, 45 N. Y., 80; *Foot v. Aetna, etc.*, 61 N. Y., 571; *West, etc.*, v. *Sheets*, 26 Gratt. (Va.), 854.

But see *Imperial, etc.*, v. *Murray*, 73 Penn. St. R., 18; *McCulloch v. Norwood*, 58 N. Y., 563; *Owens v. Ins. Co.*, 56 N. Y., 565; *Clinton v. Ins. Co.*, 45 N. Y., 454; *Cushman v. Ins. Co.*, 1 Week. Dig., 441; *Cheever v. Union, etc.*, 1 N. Y. Weekly Dig., 374, Super. Court of Cincinnati.

And if the statements considered in such survey are to be considered promissory, rather than an affirmative warranty, yet the rights and duties of the parties are not altered. If the promise has not been kept—the condition precedent performed—the insurer is not bound by the policy: *Ripley v. Aetna Ins. Co.*, 80 N. Y., 136, reversing 29 Barb., 552; *Bilbrough v. Metropolis Ins. Co.*, 5 Duer, 587; *Bank v. Ins. Co.*, 50 N. Y., 45; *West, etc.*, v. *Sheets*, 26 Gratt., 854.

But see *Alston v. Mechanics, etc.*, 4 Hill, 329; *Smith v. Mechanics, etc.*, 32 N. Y., 399.

As to life insurance, some of the courts have held policies void for warranties which would not have avoided fire policies: *Valton v. National, etc.*, 20 N. Y., 32; *Fitch v. Ins. Co.*, 59 N. Y., 557; *Smith v. Aetna Ins. Co.*, 49 N. Y., 211; *Cushman v. U. S. Ins. Co.*, 1 N. Y. Weekly Dig., 441, reversing 4 Hun, 783; *Day v. Mutual, etc.*, 1 MacArthur, 41, 6 Am. Law Times Rep., 286.

But see *Insurance Co. v. Francisco*, 17 Wallace, 672; *Horn v. Amicable*,

etc., 64 Barb., 81; *Swift v. Mass. Life Ins. Co.*, 1 N. Y. Weekly Dig., 395.

If an agent of the assurer makes out a survey and tells the applicant he has authority from the company to do so, and the applicant signs the survey without looking at its correctness, the company is liable if the representations of the agent as to his authority were correct: *Plumb v. Catteraugus Ins. Co.*, 18 N. Y., 392; *Rowley v. Empire Ins. Co.*, 36 N. Y., 550; S. C., more fully, 4 Abb. Court Appeals Dec., 181; *Ames v. N. Y., etc.*, 14 N. Y., 253; *Owen v. Farmers, etc.*, 57 Barb., 518; *Baker v. Home Ins. Co.*, 2 N. Y. Weekly Dig., 366; *Ins. Co. v. Wilkinson*, 13 Wall., 222; *Ins. Co. v. Mahone*, 21 Wall., 152.

See *Pindar v. Resolute, etc.*, 47 N. Y., 114; *Shoemaker v. Glens Falls, etc.*, 60 Barb., 84, 102; *Hopkins v. Provincial Ins. Co.*, 18 Upper Can. C. P., 74; *Foot v. Aetna, etc.*, 61 N. Y., 571.

Knowledge of the agent of the assured of facts affecting the risk is immaterial in the absence of fraud or of his having prevented their statement by the applicant: *Chase v. Hamilton, etc.*, 20 N. Y., 52; *Foot v. Aetna Ins. Co.*, 61 N. Y., 571.

But see *Bidwell v. Ins. Co.*, 24 N. Y., 302; *Magee v. Exchange Ins. Co.*, 3 Abb. Court Appeals Dec., 265; *Rowley v. Empire, etc.*, 4 Abb. Court Appeals Dec., 131; *Hopkins v. Provincial Ins. Co.*, 18 Upper Canada C. P., 74.

Parol evidence to show that the agent of the insurers was informed that a watchman was not kept in the building insured, from twelve o'clock Saturday night till twelve o'clock Sunday night is inadmissible: *Ripley v. Aetna Ins. Co.*, 80 N. Y., 136, 161-2, reversing 29 Barb., 552; *Alston v. Mechanics, etc.*, 4 Hill, 329.

But see *Reynolds v. Ins. Co.*, 47 N. Y., 597; *Bidwell v. North Western Ins. Co.*, 24 N. Y., 302; *Rowley v. Empire Ins. Co.*, 4 Abb. Court Appeals Dec., 131, 36 N. Y., 550; *Hopkins v. Provincial Ins. Co.*, 18 Upper Canada C. P., 74.

Where one of the questions asked

was the "relative situation of the property to be insured as to other buildings; distance to each within 10 rods": the printed form concluded with the statement, "All of the exposures within 10 rods are mentioned": Held that the application constituted a warranty that no other building than those named existed within ten rods: *Chaffee v. Catteraugus, etc.*, 18 N. Y., 376.

Held that the insured was bound to state all the buildings within ten rods, and could not claim that buildings within ten rods were not exposures: *Chaffee v. Catteraugus, etc.*, 18 N. Y., 376.

But see *Huntley v. Perry*, 38 Barb., 569.

A failure to state the direction of the two nearest buildings, or to disclose other buildings a few feet off, not known to the applicant or his agent who made the application, will not avoid the policy: *Hall v. People's, etc.*, 6 Gray, 185.

To an inquiry in the application whether the assured was "owner, mortgagee or lessee," he replied "owner." The buildings belonged to the applicant but stood on *leasehold* land. The insured defended on the ground of this alleged misstatement. "At the trial plaintiff tendered the evidence of the owner of an adjoining building to show that he (witness) had told defendants' agent how the buildings were situated, and that the agent knew the position of all to be the same; but this evidence was rejected as contradicting plaintiff's own written statement, and the jury were directed to find for defendants on the above plea, the learned judge refusing to leave to them the question of misrepresentation on plaintiff's part: Held that this direction was wrong: that the word "owner" having no definite meaning in law, but being applicable to various interests which parties have in buildings, if plaintiff used it in good faith he ought not to suffer, and the question whether he fairly represented the facts regarding the risk should have been left to the jury.

Held, also, that in order fairly to judge of the answers of plaintiff, evidence might be given of the surrounding facts as to the ownership of the building and of the land: and that to establish the *bona fides* of plaintiff's

answer he might show that defendant's agent who drew up his statement had been informed by plaintiff, or some one else to plaintiff's knowledge of the state of the title to the premises. A new trial was, therefore, granted: *Hopkins v. Provincial Ins. Co.*, 18 Upper Canada C. Pl., 74.

Where the application states that the building was used as a hotel the fact that, without the knowledge or assent of the assured it was used by the tenant as a house of ill-fame, will not avoid the policy: *Hall v. People's, etc.*, 6 Gray, 185.

The issuing of a policy upon an application, one interrogatory in which is unanswered, is a waiver of that defect: *Hall v. People's, etc.*, 6 Gray, 185.

The moment the parties agree, the one to insure and the other to pay the premium, it becomes a binding contract between them, though never reduced to writing. The insured becomes bound for the premium when he has agreed to pay it, and the insurer is bound to give a policy, and must indemnify in case of loss: *Train v. Holland Purchase Ins. Co.*, 1 N. Y. Weekly Dig., 249; *Bunten v. Orient, etc.*, 8 Bosw., 448, affirmed 1 Abbott Court App. Dec., 257.

But if the transaction was but the preliminaries to making a contract of insurance and no premium was paid or credit given therefor there is no insurance: *Dinning v. Phenix Ins. Co.*, 68 Illinois, 414; *Brook. Bap. Church v. Brooklyn*, 28 N. Y., 153; *Mackey v. Mutual*, 118 Mass., 178.

But see *Bap. Ch. v. Brooklyn, etc.*, 19 N. Y., 305; *Post v. Aetna Ins. Co.*, 43 Barb., 351.

So where the application is not an ordinary one, and no rate of premium has been agreed upon, and no policy issued, the contract of insurance is not complete although the secretary of the company stated to the applicant that he might "hold himself insured." *Christie v. North British, etc.*, 3 Cases in Court of Sessions (Scotland), 360, S. C., 1 Bennett's Fire Ins. Cas., 145; *Bap. Church v. Brooklyn, etc.*, 28 N. Y., 153.

But see *Bap. Church v. Brooklyn, etc.*, 19 N. Y., 305; *Post v. Aetna Ins. Co.*, 43 Barb., 351, 361; *Shelton v. Atlantic*, 26 N. Y., 460.

1875 In re Universal Non-Tariff Fire Ins. Co. Forbes & Co.'s Claim. V.C.M.

The insured is liable for the premium the moment he agrees for an insurance, whether a policy be issued or not: *Sun, etc., v. Davis*, 3 Robertson, 254, 19 Abb. Prac., 214.

In *Baldwin v. Chouteau Ins. Co.*, (56 Mo., 152), the court said: "In *Keim v. Home Ins. Co.*, (42 Mo., 38), the court said: 'We decided that where an application for insurance was filed, and on the same day the company proceeded to make out and sign the policy, it ratified the application, and its consent was complete.'" See the numerous cases cited, 56 Mo., 153-157; see also *Home, etc., v. Curtis*, 32 Mich., 402, *May on Ins.*, § 44.

In the case of *Train v. Holland Purchase Ins. Co.*, (1 N. Y. Weekly Dig., 249), without any express agreement as to the rate of insurance or as to the company in which the insurance should be procured, the agent had written defendants for a policy in behalf of the plaintiff, plaintiff had not expressly accepted the policy. No premium was paid by plaintiff, though the policy contained a clause that, "If the premium of insurance shall not have been paid, such insurance shall be void." The policy was delivered to plaintiff by the agent after the fire without the payment of any premium. (1 Hun, 527). The Supreme Court held the company was not liable, and nonsuited the plaintiff. The Court of Appeals reversed the nonsuit, saying: "Then, the application sent by Goggin was the application of the plaintiff to the defendant, and as soon as it was accepted by the defendant, the contract between them was complete. The plaintiff was then bound to pay the premium, and the defendant was bound to indemnify the plaintiff." See also *Home, etc., v. Curtis*, 32 Mich., 402.

That a parol agreement to insure binds the company to do so, and to issue a policy for the amount, although no policy has in fact been written out or delivered, is now well settled: *Angel v. Hartford Ins. Co.*, 59 N. Y., 171; *Trustees v. Trustees*, 19 N. Y., 805, 18 Barb., 69; *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y., 402, affirming 4 Lans., 433, 437-8; *Audubon v. Excelsior Ins. Co.*, 27 N. Y., 216; *Hotchkiss v. Germania Ins. Co.*, 5 Hun, 90, 96-9; *Carpenter v. Mutual, etc.*, 4 Sandf. Ch.,

408; *Post v. Aetna Ins. Co.*, 43 Barb., 352, 360-4, 368; *Whittaker v. Farmers, etc.*, 29 Barb., 312; *Rhodes v. Railway, etc.*, 5 Lans., 71; *Perkins v. Wash. Ins. Co.*, 4 Cow., 645; *Kelly v. Commonwealth Ins. Co.*, 10 Bosw., 82; *Leeds v. Mechanics, etc.*, 8 N. Y., 351; *Bidwell v. Astor, etc.*, 16 N. Y., 263; *Gerrish v. German, etc.*, 55 N. H., 355.

Otherwise in Georgia, by statute: *Simonton v. Liverpool, etc.*, 51 Geo., 76.

The case of *Bradley v. The Potomac Fire Ins. Co.*, (3 Am. Rep., 121, 32 Maryland, 108), is not necessarily in conflict with this proposition. It may be sustained as an "inchoate" agreement for insurance.

Bradley had fifteen days in which to determine whether he would accept the contract or not; had he elected not to accept it he could have done so, and would not have been liable for the premium. It was a conditional contract which the party had a right to accept or not as he saw fit. In that case there was no completed contract of insurance. But if in conflict with the main propositions it is clearly contrary to the current of authority.

Where, however, an application for insurance was made in March but was not to take effect until the making of a policy, and the latter was not made until the succeeding January, held that the application spoke as of the latter date, and any intervening increase of risk would not avoid the policy: *Fourdinier v. Hartford, etc.*, 15 Upper Can. Com. Pl., 403.

A policy delivered to and accepted by the insured may be reformed at any time thereafter. The length of time he keeps it, after delivery, without objection, is a circumstance of more or less cogency, to show there was no mistake; but is not as matter of law a defence to a reformation: *Van Tuyl v. Westchester, etc.*, 55 N. Y., 657; *Bidwell v. Astor, etc.*, 16 N. Y., 263. But see *Pindar v. Resolute, etc.*, 47 N. Y. R., 114.

So if the insurer has waived payment of the premium at the prescribed time it may be paid after loss: *Honell v. Knickerbocker, etc.*, 44 N. Y., 277; *Worden v. Guardian Mutual, etc.*, 39 N. Y. Sup. Court Rep., 317; *Whittaker v. Farmers' Ins. Co.*, 29 Barb., 312; *Chase v. Hamilton, etc.*, 22 Barb., 527; *Shaw*

v. *Republic Ins. Co.*, 2 N. Y. Weekly Dig., 212.

Or may be deducted or recouped from the insurance: *Martin v. International*, etc., 53 N. Y. 339, reversing 62 Barb., 181.

An offer to pay the same within a reasonable time is sufficient: *Leslie v. Knickerbocker*, etc., 1 N. Y. Weekly Dig., 232, 2 Hun., 616, 5 N. Y. Sup. Ct. Rep. (T. & C.), 193; *Fried v. Royal*, etc., 47 Barb., 128.

But if credit is given only for a definite time, the premium must be paid within that time or the policy is not binding: *Roehner v. Knickerbocker*, etc., 1 N. Y. Weekly Dig., 346, Court of Appeals; *Wall v. Home Ins. Co.*, 86 N. Y., 157, affirming 8 Bosw., 597.

Where the occurrence of war between the state of the assured and of the insurer prevents the transmission of the premiums, it excuses payment thereof, and a condition in the policy forfeiting the policy and all payments made thereon in case of non-payment of the annual premiums as they fall due is suspended during the existence of the war. A tender within a reasonable time after its termination, of the premiums unpaid with the premiums upon each from the time it fell due, revives the policy: *Cohen v. Ins. Co.*, 50 N. Y., 610; *Sands v. Ins. Co.*, 50 N. Y., 626; *Martin v. International*, 53 N. Y., 339.

Sickness of the assured is not a sufficient excuse for non-payment of premiums at the time fixed: *Howell v. Ins. Co.*, 44 N. Y., 276; *Howell v. Knickerbocker*, etc., 44 N. Y., 277, 285; *Trustees*, etc., v. *Brooklyn*, etc., 19 N. Y., 305; *Trustees v. Trustees*, 28 N. Y., 153; *Wood v. Poughkeepsie*, etc., 32 N. Y., 619; *Pratt v. N. Y.*, etc., 55 N. Y., 505, 511 affirming 64 Barb., 589; *Hotchkiss v. Germania*, etc., 5 Hun., 90, 98, 99; *Shear v. Phoenix*, 4 Hun., 800; *Dean v. Aetna*, etc., 2 Hun., 558; 4 N. Y. Sup. Ct. R. (T. & C.), 504; *Post v. Aetna Ins. Co.*, 43 Barb., 351, 360-364; *Carroll v. Charter Oak*, etc., 40 Barb., 292, affirmed 1 Abb. Ct. App. Dec., 316; *Carroll v. Charter Oak*, etc., 38 Barb., 402; *Winans v. Allemania*, etc., 38 Wisc., 342.

Payment of the premium at the time of making the contract for an insurance is not necessary to make the contract binding upon the company: if a credit be given by the agent it is equally obligatory: *Angel v. Hartford*, etc., 59 N. Y., 171.

Although by the printed terms of the policy, it is stated that no policy will be considered binding until the premium is paid, yet the agent may waive such condition and give a credit: *Dean v. Aetna*, 1 N. Y. Weekly Dig., 281, Court of Appeals; *Bohen v. The Williamsburgh*, etc., 35 N. Y., 131; *Shelden v. Atlantic*, etc., 26 N. Y., 400.

So a parol waiver of a condition in a policy is good, notwithstanding a provision in the policy that nothing but a written agreement, signed by an officer of the company, shall have that effect: *Carroll v. Charter Oak*, etc., 1 Abb. Court Appeals, Dec., 316, affirming 40 Barb., 292; *Van Allen v. Farmers*, etc., 4 Hun., 413; *Parker v. Arctic Ins. Co.*, 1 N. Y. Sup. Court Rep. (T. & C.), 397, affirmed 59 N. Y. R., 1; *Golt v. National Prot. Ins. Co.*, 25 Barb., 189; *Pitney v. Glens Falls*, etc., 61 id., 335.

Waiver of present payment by a clerk who is sent to the assured with the policy, may be held good: *Eclectic*, etc., v. *Fahrenkrug*, 68 Illinois, 463; *Kolymers v. The Guardian*, etc., 10 Abb. Prac. (N. S.), 176; *Leslie v. Knickerbocker*, etc., 1 N. Y. Weekly Dig., 232, Court Appeals, 2 Hun., 616, 5 N. Y. Supreme Court Rep., 193; *Bodine v. Exchange Ins. Co.*, 51 N. Y., 117; *Dean v. Aetna Ins. Co.*, 1 Weekly Dig., 281.

In *Leslie v. Knickerbocker Ins. Co.*, (decided Oct. 5, 1875), there was no agreement for credit or an extension of time to pay the principal. The agent of the company had simply said he would notify the assured of the time for payment; that it was the custom of the company to notify the assured by mail. This it neglected to do (5 N. Y. Sup. Court Rep., T. & C., 193, 2 Hun., 616). The Court of Appeals held (1 N. Y. Weekly Dig., 232), that proof that it was customary for the company to send the assured notices was competent, and on proof of that fact, the jury were authorized to find that the assured relied upon it, and if he did, such custom and statement were a sufficient excuse for non-payment at the time prescribed by the policy.

An agreement by an agent or officer of an insurance company, that a policy of insurance shall take effect without payment of the premium, notwithstanding it contained a clause that it shall be of no binding force upon the insurer, until payment of the premium, may be

1875 In re Universal Non-Tariff Fire Ins. Co. Forbes & Co.'s Claim. V.C.M.

established by or inferred from the circumstances surrounding the transaction.

A contract to give credit for the premium or a waiver of payment "may be shown by direct proof that credit was given, or may be inferred from circumstances." *Bodine v. Exchange, etc.*, 51 N. Y., 117; *Boehen v. Williamsburgh, etc.*, 35 id., 131; *Bowman v. Agricultural Ins. Co.*, 59 N. Y., 521, affirming 2 N. Y. Sup. Court Rep. (T. & C.), 261; *Goit v. National Prot. Ins. Co.*, 25 Barb., 189, Allen, J.

But see *Riply v. Aetna*, 30 N. Y. R., 136; *O'Reilly v. Guardians, etc.*, 60 N. Y., 169.

An agreement by parties may be inferred from circumstances: *Smith v. Gugerty*, 4 Barb., 615; *Meehan v. Williams*, 2 Daly, 367; *Mayor, etc., v. Butler*, 1 Barb., 325.

And may be raised by implication from their conduct and the transactions between them, even as to an undertaking which is irregular and which the party could not be obliged to accept: *Decker v. Judson*, 16 N. Y., 443.

So a waiver of payment of the premium before a policy, or a renewal of one, shall take effect, or an extension of time to pay the premium, may be established by proof of a custom by the company or a particular agent to give credit for the premium: *May on Insurance*, 434; *Kolgers v. Guardian, etc.*, 10 Abb. Prac. (N. S.), 176; *Buckbee v. U. S. Insurance Co.*, 18 Barb., 541; *Helm v. Philadelphia, etc.*, 61 Penn. St. R., 107; *Staunton v. Western Assurance Co.*, 21 Grant's (Upper Canada) Ch. R., 578; *Bodine v. Exchange, etc.*, 51 N. Y., 117; *Eclectic, etc., v. Fahrenkrug*, 68 Ills., 463.

The previous course of business between the assured and insurer will be regarded as a part of the implied agreement between them: *Isaacs v. Royal, etc.*, L. R., 5 Excheq., 296; *Hall v. Steel*, 68 Illinois, 231.

So the fact that on a single occasion the company had given credit for the premium, or it had been accepted after the policy took effect, is sufficient to warrant a submission to the jury of the question whether the condition had been waived and sufficient to sustain a verdict so finding: *Bowman v. Agricultural Ins. Co.*, 59 N. Y., 521, affirm-

ing 2 N. Y. Supreme Court Rep. (T. & C.), 261.

And where any circumstances tending to prove that the policy was to take effect, notwithstanding non-payment of the premium, it is sufficient to send the case to the jury on that question: *Sheldon v. Atlantic Ins. Co.*, 26 N. Y., 460, 465, 466; *Helm v. Phila. Life Ins. Co.*, 61 Penn. St. R., 107.

It is immaterial whether the suit was brought for a specific performance of an agreement to insure or for damages upon a contract to insure. The rule of damages is the same: *Fried v. Royal Insurance Co.*, 50 N. Y., 243, affirming 47 Barb., 127; *Angel v. Hartford, etc.*, 59 N. Y., 171; *Post v. Aetna Ins. Co.*, 43 Barb., 352.

It is no part of an agreement to insure that its validity shall depend upon an actual delivery of a policy of insurance to the insured: *Fried v. Royal, etc.*, 47 Barb., 217, affirmed 50 N. Y., 243; *Angel v. Hartford, etc.*, 59 N. Y., 171; *Home, etc., v. Curtis*, 32 Mich., 402.

A policy which recites that it is "signed, sealed and delivered" is complete and binding as against the party executing it though in fact it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it. It is not necessary that the assured should formally accept or take away the policy in order to make the delivery complete: *Xenos v. Wickham*, L. R., 2 H. L., 296.

Nor if a building insured be burned before the assured call for the policy or pay the premium is he bound to inform the insurer of such destruction.

"The judge before whom the action was tried has found that there was no fraud or concealment on the part of the plaintiff, and I think the plaintiff was under no legal or moral obligation to inform the defendant, or its agent, of the fire, before or at the time the premium was paid, for the agent had received the application for the insurance and given the plaintiff credit for the premium, according to the finding of the judge upon the evidence (2 Dutcher, 274). The plaintiff was entitled to have his application for insurance acted upon by the defendant, after the fire, in precisely the same manner that it would have been if no fire had oc-

curred : *Whittaker v. Farmers, etc.*, 29 Barb., 314 ; *Hallock v. Commercial, etc.*, 26 N. J. Law, 2 Dutcher, 268, 274 ; *Howell v. Knickerbocker, etc.*, 44 N. Y., 277 ; *Worden v. Guardian, etc.*, 39 N. Y. Superior Court Rep., 317 ; *Chase v. Hamilton*, 22 Barb., 527.

In *Baldwin v. Chouteau Ins. Co.* (56 Missouri, 152), the court said, "that the acceptance of the proposal to insure for the premium offered was the completion of the negotiation, and that when the company accepted the premium and delivered the policy, the agreement to insure was complete and executed, and related back to the day when the application was filed and the policy made out and signed, and that the building insured having been burnt in the meantime, the plaintiff was under no legal

or moral obligation to inform the company of that fact.

See 9 Eng. Rep., 861 note ; *Home, etc.*, v. *Curtis*, 32 Mich., 402.

Where one agrees with an insurance company for an insurance without any agreement or understanding to that effect, the insurer has no right to insert a clause in the policy that the insurance shall not take effect until payment of the premium.

Until the delivery or a tender of a policy containing such a clause, "the condition usually inserted in such policies, requiring prepayment of the premium to make them binding, unless adopted by the parties in such oral contract, forms no part of the contract of insurance between them"—the parties : *Kelly v. Commonwealth, etc.*, 10 Bosw., 82.

INDEX.

A

ABATEMENT.

1. In an action against the defendant for negligently allowing an area to remain open in a highway, whereby the plaintiff (an infant, suing by next friend), was injured, the case was tried after term, and a nonsuit directed, on the ground that there was no evidence of negligence; the judge staying execution to enable the plaintiff to move to set aside the nonsuit. During the vacation the plaintiff died. In the following term, the plaintiff's next friend obtained a rule *nisi* to set aside the nonsuit, on the ground that there was evidence of negligence, and the defendant a rule *nisi* to tax his costs, or why the court should not allow judgment to be signed for him *nunc pro tunc*;

Held, that the action having abated by the plaintiff's death, a motion to set aside the nonsuit could not be entertained. As however the judge by staying execution had intimated that he regarded the question as to the defendant's liability a doubtful one, judgment *nunc pro tunc* ought not to be entered for the defendant. The defendant's rule must be discharged, without costs, and the plaintiff's rule allowed to drop. *Hemming v. Batchelor*. 515, 519 note.

See WRONGFUL DEATH, 310.

ABATEMENT OF LEGACIES.

See REAL ESTATE, 387.

'ACCESSION.

See BANKRUPTCY, 714, 718 note.

ACCESSORY.

See CRIMINAL LAW, 636, 638 note.

ACCOMPLICE.

See CRIMINAL LAW, 636, 638 note.

ADDITION

See CHATTEL MORTGAGE, 524.

ADEMPITION.]

See GIFT, 750.

ADMIRALTY.

1. Where over the main deck of a ship there was a covering or awning open at the sides, and unfit for the carriage of cargo, passengers, or crew, it was held by the House, affirming the decision appealed from, that tonnage was not chargeable in respect of such covering or awning as if it were a third deck:

Per THE LORD CHANCELLOR: I am of opinion that the ship in this case has not a third deck, available for cargo, or for the berthing or accommodation of passengers or crew.

2. *Per* LORD O'HAGAN: The measurement of the ship's tonnage should be in accordance with her carrying capacity. *Lord Advocate v. Clyde, etc.* 104

3. By a charterparty made with the defendant, plaintiff's ship was to proceed to W., and there load a cargo "in the customary manner," and proceed to R. and deliver, "the cargo to be discharged in ten working days (weather permitting), commencing, &c. Demurrage at £2 per 100 tons reg. per day. . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship." The customary rate of loading at W. was proved to be twenty tons a day:

Held, that the clause for lien and for exemption of the charterer applied only to demurrage at the port of discharge, not to damages for delay at the port of loading. *Lockhart v. Falk.* 573

4. A bark laden with a cargo shipped at Charleston under bills of lading where by the cargo was to be delivered on payment of freight at Bremen, whilst prosecuting her voyage to Bremen, was run into in the English Channel and damaged by another vessel, which was alone to blame for the collision. The master and crew of the bark abandoned her, and in her abandoned state she was taken possession of by salvors, who brought the bark and her cargo into Dover. The cargo was damaged by sea-water, and was alleged to be deteriorating. In a suit instituted by some of the salvors against the bark, her cargo, and freight, the court, on an application made on behalf of the plaintiffs, without notice to the owners of the bark, ordered the cargo to be sold. The owners of the bark afterwards hearing of the order, and wishing to have the cargo transhipped and carried on to its destination, applied to the court to rescind the order, and offered to give bail for the cargo. The court being of opinion that it was for the benefit of all parties that the cargo should be sold, refused to prevent the sale, but reserved all questions of freight. Afterwards the cargo was sold, and the proceeds brought into court, and the owners of the bark then applied to the court to order the payment out of the proceeds in court of a sum of money in respect of freight:

Held, that, by the abandonment of the bark, the contract to pay freight had been dissolved, and that the owners of the bark were not entitled to any

payment in respect of freight. *The Kathleen.* 645

See INSURANCE, MARINE, 201.,

ADVERSE POSSESSION.

See LIGHT, 726.

AGREEMENT.

1. Plaintiff lent defendants £50 under an agreement: "Defendants agree to borrow from plaintiff the sum of £50 at the rate of £6 per annum, and plaintiff agrees to lend defendants the above sum for the term of nine or six months":

Held, that the option of making it a loan for six or nine months was in the defendants, the borrowers. *Reed v. Kilburn.* 295, 296 note.

See DAMAGES, 296.

FRAUDS, STATUTE OF.

INDEMNITY, 316, 322 note.

INSURANCE.

MORTGAGE, 743.

SALE, 631.

TITLE, 345, 357 note.

AIR.

See LIGHT, 726.

AMBIGUITY.

See WILL, 1.

APPRENTICE.

1. Declaration, that the defendant agreed with the plaintiff to take his son as an apprentice for three years, to learn the business of a tea-broker; and in consideration of £200, to teach him such business and pay him a salary, provided that he should obey all commands and

give his services entirely to the business during office hours: Breach, that the defendant dismissed the son from his service. Plea: that the son misconducted himself in the service, by wilfully disobeying the orders of the defendant, and by habitually neglecting his duties and refusing to give his services during office hours without just cause, wherefore the defendant discharged him:

Held, on demurrer, that the proviso empowered the defendant to discharge the apprentice, and that the plea was good. *Westwick v. Theodor*. 280

APPURTENANCES.

See GRANT, 760.

APPURTENANT.

See EASEMENT, 250, 256 *note*.

ARBITRATION AND AWARD.

1. An award will not be sent back to the arbitrator on the ground that he has made a mistake in the legal principle upon which his award is based, except where the arbitrator himself admits the mistake. *Dinn v. Blake*. 449

ASSAULT AND BATTERY.

See CRIMINAL LAW, 636, 638 *note*.

ASSIGNMENT.

1. A writing opening a credit for a particular sum cannot, of itself, constitute an equitable assignment or specific appropriation of that sum so as to create a trust. It is a mere statement that the person writing it will act as paymaster to the person to whom it is

written, up to a certain amount, on his performing the conditions set forth in it.

2. L. entered into a contract (dated the 30th of November, 1870) with the French Minister of War, represented by J., his delegate at London, to supply 20,000,000 of ball-cartridges of a certain quality, the whole to be supplied by the 10th of January, 1871. Time was to be considered of the essence of the contract. L. desired some arrangements to be made as to payment. M. & Co., who acted in London as financial agents for the French Government, wrote to L. a letter dated the 1st of December, 1870, in these terms: "We are instructed by J. to advise you that a special credit for the sum of £40,000 has been opened with us in your favor, and that it will be paid to you ratably as the goods are delivered, upon receipt of certificate of reception issued by the French Ambassador or by J." The goods were not delivered according to the contract:

Held, that this letter did not constitute Messrs. M. & Co. trustees for L. as to the sum named, nor constitute an equitable assignment as of a fund in their hands, and that consequently this was not a matter for the exercise of the jurisdiction of the Court of Chancery. *Morgan v. Lariviere*. 52, 66

See INSURANCE, MARINE, 282.
NOTICE, 886.
PATENT, 841.

ATTORNEY

1. How far client bound by acts of. 127, 145 *note*.
2. The defendant having recovered a sum of money in an action brought by him against M., B., the defendant's attorney in that action, had taken out a summons for an order charging his costs in such action upon the sum recovered. The plaintiff afterwards, having recovered judgment in his action against the defendant, obtained an ex parte garnishee order attaching the sum recovered by defendant against M., in execution.

Under these circumstances the parties came before a judge at Chambers, B.,

claiming to have a charging order on the judgment debt as property recovered within the 28th section of 23 & 24 Vict. c. 127, and the plaintiff claiming an order on M. to pay the sum attached to him. The judge made an order in favor of B. :

Held, that he was right in so doing; that the sum recovered was property within the section, and that the attorney was entitled to priority. *Birchall v. Pugin*. 458, 462 note

3. B. acted as attorney for G, in an action which resulted in G.'s recovering a large sum. A bill was filed by persons claiming through G. to establish their equitable title to that sum, and in February, 1871, the defendant in the action paid the sum recovered into court to the credit of the cause in which B. was a defendant in respect of his lien. In March, 1871, B. delivered his bill of costs in the action to G. In December, 1873, the suit was compromised and the fund distributed, except a sum kept in court to answer B.'s claims :

Held (reversing the decision of Malins, V.C.), that B. was not entitled to have his bill of costs paid out of the fund without taxation, however the case might have stood, if his bill had been delivered at such a time that G.'s right to tax it would have been lost before the fund was paid into court. *De Bay v. Griffin*. 781

4. A defendant, shortly after filing an affidavit as to documents, entered into liquidation of his affairs by arrangement. Some time afterwards he changed his solicitors. The plaintiff applied for production of the documents, which the defendant resisted on the ground that they were in the possession of his former solicitors, who claimed a lien on them :

Held (affirming the decision of Bacon, V.C.), that an order for production must be made, with liberty to apply in case the defendant found it impossible to produce the documents, the plaintiff not to attach the defendant without leave of the court.

5. *Per James, L.J.*: A solicitor cannot set up a lien acquired in a cause as against the right of other parties in the cause to production. *Vale v. Oppert*. 748

AVERAGE.

See INSURANCE, MARINE, 473.

AWARD.

See ARBITRATION AND AWARD, 449.

B

BANKRUPTCY.

1. All the parties to certain bills of exchange, the payment of which was secured as between some of them, became insolvent—one of them (a company) being ordered to be wound up. The securities were realized, and the proceeds paid to the bill-holders, upon the principle of *Ex parte Waring*. After the bills had matured, but before the securities were realized, the holders had proved against the company for the full amount :

Held (affirming the decision of the Master of the Rolls), that the proof must be reduced by the amounts received by the bill-holders from the securities, and any dividends received on the excess of the original over the reduced proof must be refunded. *Matter of Burned's Banking Co*. 704

2. A creditor of a bankrupt died before the commencement of the bankruptcy, and his estate was administered in chancery in a suit instituted by a creditor against the administratrix. The Court of Chancery appointed a person who was not the administratrix to prove the debt against the bankrupt's estate :

Held, that the person appointed by the court had a right to prove the debt, and also to vote for the appointment of a trustee at the meeting of creditors.

3. The 67th and 68th rules of the Bankruptcy Rules, 1870, only apply to ordinary cases, and not to proofs by persons appointed by the Court of Chancery or of Lunacy to represent the creditor's estate. *Ex parte Hare*. 711

4. A petition for liquidation having been presented, a receiver was appointed and ordered to take possession of the fixtures and stock-in-trade at the debtor's brewery; and an injunction was granted restraining a mortgagee, who was in possession of the brewery under a bill of sale, from intermeddling with the chattels in the brewery. When the injunction was granted the receiver and the debtor gave undertakings to be answerable for damages. The mortgagee afterwards established his title to the brewery and the chattels in it, and then applied for an inquiry as to damages sustained by the occupation of the receiver:

Held, that the receiver must be treated as the agent of the creditors, and not of the mortgagee, and could not charge the mortgagee with the expense of carrying on the business; and that he was liable, under his undertaking, for damage for deterioration of the property, and for rent for use and occupation of the fixtures and stock-in-trade; and an inquiry was directed accordingly.
Ex parte Warren. 714, 718 note.

5. A creditor issued execution against a trader for a debt above £50. After the goods seized by the sheriff had been sold, the same creditor issued another execution against the debtor for another debt above £50. The goods seized under the second execution were sold, and the money produced by the sale was paid over to the creditor, the sheriff having had no notice within fourteen days from the sale of any bankruptcy petition against the debtor. Afterwards the debtor was adjudicated a bankrupt upon the act of bankruptcy committed by the seizure and sale under the first execution. The money produced by the first sale was not paid to the creditor till after the sale under the second execution:

Held, that, though it was not proved that the creditor had, when the sale took place under the second execution, any actual knowledge that the sale had been made under the first, he must be deemed to have had notice of the proceedings under his own execution, and must therefore refund the money produced by the second execution.
Ex parte Davies. 830

6. The omission of a joint stock company to comply with a statutory notice requiring payment of a debt, served by a

creditor on the company under the Companies Act, 1862, s. 80, subs. 1, is not "neglect" within the meaning of that sub-section, unless there is no reasonable cause for the omission.

7. A creditor who has served such a notice is not entitled to a winding-up order if the company *bona fide* dispute the debt, and there is no evidence of the insolvency of the company (other than the non-compliance with the notice), and insolvency is denied on the part of the company.

8. Where a creditor whose debt was disputed served such a notice, and at the expiration of three weeks filed a petition to wind up the company under circumstances which, in the opinion of the court, showed that the object of the petition was not to obtain a winding-up order, but to put pressure on the company:

Held, that the petition must be dismissed with costs. *Matter of London, etc., Banking Co.* 833, 837 note.

See LIEN, 782, 792 note.

NOTICE, 836.

PRINCIPAL AND SURETY, 707, 711 note.

BILLS OF EXCHANGE.

See BONA FIDE HOLDER, 592, 608 note.
NEGLECT, 617, 628 note.

BILL OF LADING.

See FACTOR, 418.

BODIES.

See BURIAL, 654, 656 note.

BONA FIDE.

See BANKRUPTCY, 830.
FACTOR, 418.

BONA FIDE HOLDER.

1. The title of a creditor to a negotiable security given to him on account of a pre-existing debt, and received by him *bona fide* and without notice of any infirmity of title on the part of the debtor, is indefeasible, whether that security be payable at a future time or on demand. *Currie v. Misa.* 592, 608 note.

See BONDS, 156, 165 note.
NEGLIGENCE, 617, 628 note.

BONDS.

1. *Held*, that the act of the provincial legislature of New Brunswick (33 Vict. c. 47), intituled "An act to authorize the issuing of debentures on the credit of the lower district of the parish of St. Stephen, in the county of Charlotte," which empowered the majority of the inhabitants of that parish to raise by local taxation a subsidy, designed to promote the construction of a railway extending beyond the limits of the province, but already authorized by statute, is within the legislative capacity of that legislature.
2. Under art. 2 of sect. 92 of the British North America Act, 1867, passed by the Imperial Parliament, the provincial legislature is enabled to impose direct taxation for a local purpose upon a particular locality within the province.
3. The act in question relates to "a matter of a merely local or private nature in the province," which by the 92d section of the Imperial Act is assigned to the exclusive competency of the provincial legislature, and does not relate to the railway, or any local work or undertaking within the excepted subjects mentioned in art. 10, sub-sect. (a) of the said section. *Dow v. Black.* 166, 165 note.
4. Scrip issued in England by the agent of a foreign government, by which the holder is to be entitled, on payment of the instalments, to delivery by the agent of definitive bonds of the foreign government on their arrival in this country, is negotiable, and passes by

delivery to a *bona fide* holder for value without title. *Goodwin v. Roberts.* 525, 534 note.

BROKER.

See FACTOR, 418.

BURIAL.

1. Under special circumstances a faculty may be granted for the erection of a school on a portion of a parish churchyard closed for burials by order in Council. *Re Bettison.* 654, 656 note.

BY-LAWS.

See ORDINANCES, 218, 226 note.

C

CARRIER.

1. The plaintiff travelled by the defendants' railway from L. to G. as a drover with cattle, without payment, on the condition, which he knew, that he travelled at his own risk. On the train arriving at G. it stopped on a bridge over a river; the parapet of the bridge was very low and dangerous, and the night dark. The plaintiff got out of the train, and in walking along the railway from the spot where the train stopped to go off the defendants' premises, fell over the parapet of the bridge and was injured.
Held, that the terms under which the plaintiff travelled exempted the defendants from liability, not only during the actual transit on the railway, but whilst the plaintiff was going from the defendants' premises. *Gallin v. London, etc.* 268, 273 note.
2. The plaintiff was consignee of some flax sent by the defendants' railway to N.

station. On its arrival at N. station, defendants sent to plaintiff an advice-note of its arrival, requiring him to remove it, and stating that they, defendants, would hold it "not as common carriers but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges."

Soon after the receipt of this notice, the plaintiff went to the station and removed two tons of the flax, but left the rest at the station for more than two months. There were no warehouses at the station, and the flax remained on open ground insufficiently covered, and became damaged by wet.

In an action for the damage it was admitted that, if the defendants were bound to take reasonable care of the flax, they had not done so:

Held, that, treating the advice-note acquiesced in by the plaintiff as a contract, the terms of it, taken altogether, did not exempt the defendants from liability for negligence to the extent that they would be liable as warehousemen or bailees for hire; and that they were therefore liable for the damage.
Mitchell v. Lancashire, etc. 288

CASES OVERRULED, REVERSED
AND CONSIDERED.

Aynsley v. Glover, 11 Eng. R., 521, affirmed. 726
Betts v. Gibbins, 2 Ad. & Ell., 57, followed. 316
Borries v. Hutchinson, 18 C. B., N. S., 445, 465, followed. 296
Caledonian, etc., v. Sprot, 2 Macq., 549, distinguished. 773
Charter v. Charter, 1 Eng. R., 249, affirmed. 1
Cole v. North Western, etc., 10 Eng. R., 249, affirmed. 418
Dacosta v. Keir, 3 Russ., 360, explained. 22
Durrill v. Evans, 1 H. & C., 174, distinguished. 567
Edwards v. Edwards, 15 Beav., 357, overruled. 22, 40
Galland v. Leonard, 1 Swanst., 161, explained. 22
Hattersly v. Burr, 4 H. & C., 523, discussed. 218
Heathcote's Trust, Matter of, 8 Eng. R., 716, reversed. 40
Holker v. Porritt, 4 Eng. R., 480, affirmed. 520

Home v. Pillans, 2 Myl. & K., 15, explained. 22
Hows v. Lord Dartmouth, 7 Ves., 187, distinguished. 808
Hutton v. Scarborough, etc., 2 Dr. & Sm., 514, 521, 4 D. J. & S., 672, distinguished. 793
Mauro v. Ocean, etc., 10 Eng. R., 325, affirmed. 473
Megrath v. Gray, L. R., 9 C. P., 216, followed. 707
Mull v. Hawker, 10 Eng. R., 468, affirmed. 538
Morgan v. Lariviere, 3 Eng. R., 499, reversed. 58
Mors Le Blanch v. Wilson, 5 Eng. R., 286, disapproved. 496
O Mahoney v. Burdett, 10 Irish Chy., N. S., 14, affirmed. 22
Phillips v. Miller, 8 Eng. R., 490, reversed. 479
Radley v. London, etc., 8 Eng. R., 516, reversed. 544
Rea v. Allen, 3 E. & E., 338, distinguished. 181
Savin v. Hoylelake, L. R., 1 Exch., 9, distinguished. 691
Staley, Matter of, 4 De G. J. & S., 407, approved. 148
Thorn v. Mayor, etc., 9 Eng. R., 475, affirmed. 555
Threfall v. Borwick, 2 Eng. R., 689, affirmed. 266
Toplis v. Grane, 5 Bing. N. C., 636, followed. 316
Tyers v. Rosedale, etc., 7 Eng. R., 273, reversed. 631
Waring, Ex parte, 19 Ves., 345, distinguished. 704, 783
Wilson v. Lloyd, 6 Eng. R., 642, disapproved. 707
Yates v. University College, 5 Eng. R., 664, affirmed. 67
Young v. Edwards, 33 L. J. M. C., 227, discussed. 218

CERTIFICATE.

1. When of city surveyor, as to building being dangerous, is conclusive. *Cheetham v. Mayor*. 324

CHARTERPARTY.

See ADMIRALTY.

CHATTEL MORTGAGE.

1. The grantor of a bill of sale was described in the affidavit filed under the Bills of Sale Act, as an "accountant." He was in fact a clerk in the accountant's department at the Euston Square Station of the London and North Western Railway Company, but in his leisure time was occasionally employed to balance tradesmen's books :

Held (affirming the decision of the court below) an insufficient description. *Larchin v. North, etc.* 524

CHILDREN.

See PARENT AND CHILD, 109, 123 *note*.

CHURCH DECORATIONS.

1. A carved stone structure or screen at the back of the holy table, called a reredos, was erected in Exeter Cathedral by the Dean and Chapter of Exeter. On the structure were sculptured representations, in bas-relief, of the Ascension, the Transfiguration, and the Descent of the Holy Ghost on the day of Pentecost, and figures of angels, and the screen was surmounted by a cross.

The Bishop of Exeter, at a visitation of the cathedral of the dean and chapter, held the structure to be illegal, and ordered it to be removed :

Held, by the Court of Arches, that it had jurisdiction to entertain an appeal from the judgment of the bishop :

2. *Held* also, that the structure was not illegal ; that if it were illegal, the bishop had not jurisdiction to order its removal. *Boyd v. Phillpotts.* 670

CITY.

See MUNICIPAL CORPORATIONS.
ORDINANCES, 218, 226 *note*.

CIVIL DEATH.

See SERVICE, 688, 690 *note*.

COMPROMISE.

See DURESS, 736, 741 *note*.

CONDITION.

See WRIT, 67.

CONFUSION.

See BANKRUPTCY, 714, 718 *note*.

CONSIDERATION, FAILURE OF.

1. Leasehold premises were mortgaged by S., who subsequently married L. After the death of L. his executors concurred in a sale by the mortgagee to C., and received the balance of the purchase-money after payment of the mortgage debt, interest, and expenses, and, in the *bona fide* belief that L. was legally entitled to the equity of redemption, disposed of such balance as part of his estate. S., the widow of L., afterwards filed a bill against C., the purchaser to recover the property, and obtained a decree against him for the value of the equity of redemption,—C. being treated as assignee of the mortgage :

Held, that C. could not recover back the money paid to the executors, as upon a failure of consideration : but must have recourse to his remedy upon the covenant, for title, if any. *Clare v. Lamb.* 399

CONSTRUCTION.

See MORTGAGE, 748.
WILLS.

CONTRIBUTION.

1. When and how far enforced among wrongdoers. 322 *note*.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 544.

CONVICT.

See SERVICE, 688, 690 note.

CORPORATIONS.

1. A power in a deed of settlement of a joint stock company authorizing the directors to mortgage or charge the property of the company, does not authorize them to include in such mortgage or charge future calls, or, in other words, the unpaid capital of the company.

2. The capital not paid up is, according to the usual forms of deeds of settlement, only *sub modo* the property of the company; a precedent condition to the absolute proprietary right of the company therein being the due making of a call by a resolution of the board of directors. *Bank South Australia v. Abrahams.* 148, 154 note.

See BANKRUPTCY, 833, 837 note.

FRAUDS, STATUTE OF, 463.

MUNICIPAL CORPORATIONS.

ORDINANCES.

STOCKHOLDERS, 691, 699 note.

ULTRA VIRES, 793, 802 note.

WITNESS, 701.

CORPSE.

See BURIAL, 654, 656 note.

COSTS.

1. When may be recovered as part of the damages to which a party is entitled. *Bazendale v. London, etc.,* 496, 506 note.

See WILL, 1.

COUNSEL.

1. How far client bound by acts of. 127, 145 note.

COUNSELLOR.

See ATTORNEY, 458, 462 note, 731.

COUNTERCLAIM.

See SET-OFF, 358.

COUPONS.

See BONDS, 525, 534 note.

COVENANT.

1. Where express cannot recover upon implied. *Clare v. Lamb.* 399

See WARRANTS, 555.

CRIMINAL LAW.

1. *Accessory.* Two men, having quarrelled, agreed to fight with their fists, and to bind themselves to fight each put down £1, so that £2 might be paid to the winner. The prisoner consented to hold the £2, and pay it over to the winner. Otherwise he had nothing to do with the fight, and he was not present at it. There was no reason to suppose that the life of either man would be endangered.

The men fought, and one of them received injuries of which he afterwards died. The prisoner having been informed who was the winner, but not knowing of the other man's danger, paid over the £2 to the winner:

Held, that the prisoner was not an accessory before the fact to the man-

slaughter of the man killed. *Regina v. Taylor*. 636, 638 note.

2. *Embezzlement*. The prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office and in the business of the board. In his father's absence the prisoner acted for him at the meetings of the board, and when present he assisted him. The prisoner was not appointed or paid by the board; and there was no evidence that he received any salary from his father. The board having occasion to raise a loan on mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use:

Held, that there was evidence that the prisoner was a clerk or servant, or employed as a clerk or servant, and was guilty of embezzlement. *Regina v. Foulkes*. 640, 643 note.

3. *Intent*. At an election of a member of a local board of health, a voting paper (form sch. A to 11 & 12 Vict. c. 63) was delivered at the house of E. R., a voter; the wife of the voter, having her husband's authority, put a cross at the bottom of the paper, and the respondent then put E. R., the voter's initials, in the margin opposite the name of the candidate for which the vote was intended, and the respondent signed his name as witness to the mark of the voter. An information having been laid against the respondent under 21 & 22 Vict. c. 98, s. 13, subs. (5), for "fabricating" the voting paper; the justices dismissed the summons, finding, on the above facts, that the respondent *bona fide* believed (as the fact was) that the wife had authority to put her husband's name to the paper, and that the respondent had no criminal or unlawful intention in putting his name as witnessing the mark of the voter:

Held, that the justices were right: for that *mens rea* was necessary to constitute the offence. *Aberdore, etc., v. Hammett*. 280, 284 note.

4. *Sentence, Enforcement of*. M. and M., convicted at the sessions of the Supreme Criminal Court of Victoria, of manslaughter committed on board a British ship on the high seas, were sentenced

to penal servitude for fifteen years, and were subsequently detained in a public gaol within the meaning of the Colonial Act, the Statute of Gaols, 1864. On a return to a writ of *habeas corpus*, to the effect that M. and M. were detained "for the cause and to the end that they may undergo the sentence aforesaid," the court ordered that the prisoners "be discharged from their imprisonment and set at large," on the ground that, by 16 & 17 Vict. c. 99, s. 6, sentence of penal servitude could not be carried into execution in the colony without the intervention of the Secretary of State:

Held, by the Privy Council that the return was sufficient; and that in any case the court erred in not remanding the prisoners until it was clear that no lawful means of executing the sentence could be found.

5. Although the act (12 & 13 Vict. c. 96) under which the Supreme Court obtained jurisdiction over the prisoners only authorized a sentence of transportation according to the law of England then in force, and although 20 & 21 Vict. c. 3, which abolished transportation, and substituted penal servitude, does not in terms include the colonies, yet this latter act is applicable to the colonies with respect to the sentences to be passed on persons convicted in the colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the former act on Colonial Courts. The policy of the former act was to authorize the Colonial Courts to try offences properly cognizable in England, with the consequences which would have attended a trial there; and that policy, in the absence of an expressed intention to the contrary, must govern the construction of both acts. The direction in 16 & 17 Vict. c. 99, s. 6, that the Secretary of State should point out the place of confinement in case of a person sentenced to penal servitude, relates only to the manner of executing the sentence, and to matters of administration, and therefore need not be resorted to in the case of sentences passed in the colonies, which may be executed according to the local procedure.
6. Under the combined effect of Imperial and Colonial legislation sentences of penal servitude may be executed in

Victoria; were this otherwise, a sentence directed by an Imperial act may not be treated as null, because no means have been previously provided in the colony for carrying it into effect. *Regina v. Mount*. 181

See EXORER, 259.

D

DAMAGES.

1. The defendant contracted to supply to plaintiff 2,000 pieces of gray shirtings, to be delivered on the 20th of October, certain, at so much per piece, the defendant being informed that they were for shipment. Shortly before the 20th of October, defendant informed plaintiff that he would be unable to complete his contract by the time specified, on which plaintiff endeavored to get the shirtings elsewhere, but, there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. The plaintiff, therefore, in order to ship according to his contract with his subvendee, procured 2,000 pieces of other shirtings of a somewhat superior quality, at an increase of price, which the subvendee accepted, but paid no advance in price to plaintiff. The plaintiff sought to recover against defendant for the breach of his contract, the difference between what he paid for the substituted shirtings and the defendant's contract price. It was admitted at the trial that the shirtings which plaintiff bought were the nearest in price and quality that could be got by the 20th of October; and the jury returned a verdict for the amount claimed:

Held, that there being no market for the article contracted for, the measure of damages was the value of it at the time of breach; and that the plaintiff having done the best thing he could, was entitled to recover the difference in the price. *Hinde v. Liddell*. 296

2. H. having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, the plaintiffs contracted with the defendants for the carriage by the defendants of the pictures over a part of the

distance. The pictures were damaged on the journey by the defendants' negligence. H. thereupon brought an action against the plaintiffs, who gave notice of it to the defendants, and requested them to defend it. The defendants refused, and told the plaintiffs to take their own course. The plaintiffs defended the action brought against them by H. without success, and then brought an action against the defendants to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defence. The defendants paid the damages into court, and disputed their liability as to the costs:

Held (reversing the judgment of the court below), that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the defendants' default, the contracts between H. and the plaintiffs, and between the plaintiffs and the defendants having been separate and independent. *Bazendale v. London, etc.*

496, 506 note.

See VENDOR AND VENDEE, 479.

DEAD BODIES.

See BURIAL, 654, 656 note.

DEATH, CIVIL.

See SERVICE, 688, 690 note.

DECORATIONS.

See CHURCH DECORATIONS, 670.

DEED.

See EASEMENT, 250, 256 note.

DEMURRAGE.

See ADMIRALTY, 573.

DESCRIPTION.

See CHATTEL MORTGAGE, 524.

DESERTION.

See DIVORCE, 688.

DIRECTORS.

See CORPORATIONS, 148, 154 *note*.

DISCOVERY.

1. In an action for libel, on an affidavit that the libel was in a printed handbill to which there was no printer's name, that the plaintiff could not ascertain who was the printer, and that the defendant had been seen with a person who affixed some of the handbills, and was also seen posting one himself, the court allowed interrogatories to be administered to the defendant as to whether he had not been instrumental in printing and publishing the libel. *Greenfield v. Reay.* 273

See WITNESS, 701.

DIVIDENDS.

See ULTRA VIRES, 798, 802 *note*.

DIVORCE.

1. A husband petitioning for a dissolution of his marriage admitted that he had separated himself from his wife before the adultery complained of, and had not contributed to her support, but alleged that such separation was caused by her persistent refusal to allow him to consummate the marriage, although he was able and willing to do so. The respondent did not deny the fact of non-consummation, but alleged that the petitioner was to blame for it owing to his physical incapacity. The court,

without deciding the question of fact whether the non-consummation was the fault of the petitioner or of the respondent, came to the conclusion that the petitioner had acted under a *bona fide* belief that the respondent had wronged him, and therefore considered that he had not been guilty of such desertion or wilful separation without reasonable excuse as to deprive him of his right to a decree of dissolution on the ground of the respondent's adultery. *Osney v. Osney.* 686

2. In every matrimonial suit, which before the passing of the Divorce Act (20 & 21 Vict. c. 85), might have been determined in an Ecclesiastical Court, the Judge Ordinary may, if he considers the circumstances of the case to require it, direct that the hearing shall take place in private. *A. v. A.* 686

See PARENT AND CHILD, 109, 123 *note*.

DURESS.

1. The prosecutors in a trade-mark case offered no evidence against the offender, and he was acquitted, he giving a letter of apology, with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months:

Held, that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter.

2. Where an offence is of such a nature that the offender may be proceeded against either civilly or criminally, there is nothing illegal or improper in a compromise of the criminal proceedings taken against him. *Fisher v. Apollinaris Co.* 786, 741 *note*.

E

EASEMENT.

1. By indenture, executed by both parties, defendant conveyed to plaintiff in

fee certain land, "subject, nevertheless, to the joint-ownership and right to the use by the defendant and the owners and occupiers for the time being, of certain adjoining land, as then enjoyed by him or them, but no further or otherwise, of the drain running through or laid in the land conveyed, and the course and direction of which was delineated on a plan in the margin of the deed, and subject to the right of the defendant and the occupiers, &c., at all reasonable times to enter upon the land thereby conveyed for the purpose of repairing the drain and laying or replacing pipes therein."

The Local Board of Health, under s. 49 of 11 & 12 Vict. c. 63, after the above conveyance, constructed a new sewer (in lieu of the old one, into which the drain discharged the sewerage from the plaintiff's and defendant's premises), at a lower depth; and the defendant thereupon lowered the drain between two and three feet and put fresh pipes (but in the course of the old drain), in order to adapt it to the new sewer. Plaintiff having brought an action of trespass:

Held, that the effect of the deed, executed by both parties, was either to create a tenancy in common in the drain between the plaintiff and defendant, or only an easement in the defendant, but that, in either view, the defendant had done no more than he had the right to do. *Finlinton v. Porter*. 250, 256 note.

See GRANT, 760.
LIGHT, 726.
WATERCOURSE, 520.

ELECTION.

See AGREEMENT, 295, 296 note.

EMBEZZLEMENT.

See CRIMINAL LAW, 640, 643 note.

ESTOPPEL

1. The plaintiff bought goods which were to be consigned to him at Liverpool from St. Helen's by the defendants' rail-

way. On the 7th of July, 1873, the plaintiff received advice-notes from the defendants informing him that *three* parcels of goods had been received by them for his account, and that they held them subject to his order and to the payment of rent and charges. The plaintiff immediately instructed his broker to sell the whole. Early in August the plaintiff received invoices of the three parcels from his vendors, and paid for the whole by an acceptance which was duly honored. The goods were sold on the 21st of August, and the rent and charges on the *three* parcels were paid to the defendants by the broker: but it turned out that *two* parcels only had been delivered to the defendants (the third still remaining on the premises of the vendors), and the plaintiff was obliged to pay to his vendees £5 4s. 1d., the difference between the price at which they had bought the third parcel and what they had to pay for other goods. The defendants' servants were aware on the 9th of July that they had never received the third parcel, but no notice of the mistake was given to the plaintiff until the 1st of September, after the goods had been resold and the charges paid:

Held, in a special action for non-delivery of the third parcel, with a count in trover, that the defendants were not estopped from showing that the goods had never reached their hands; and consequently could neither be liable in trover nor for breach of contract in not delivering the goods.

2. Ordinary definitions of an estoppel in pais. *Carr v. London, etc.* 364, 375 note.

When arises and when not, and principles of. 375 note

See FORMER SUIT, 127.

EVIDENCE.

1. When parol evidence admissible and when not. 248 note.

EX POST FACTO STATUTE.

See EXCISE, 259.

EXCISE.

1. By 33 & 34 Vict. c. 29, s. 14, "every person convicted of felony shall forever be disqualified from selling spirits by retail, and no license shall be granted to any person who shall have been so convicted; and if any person after having been so convicted shall take out or have a license, the same shall be void to all intents and purposes; and every person who, after having been so convicted, shall sell spirits by retail, shall incur the penalty for doing so without a license."

Held (by Cockburn, C.J., and Mellor and Archibald, J.J.; Lush, J., dissenting), that the section applied to a person convicted of felony either before or after the act passed; and that licenses held by a person convicted before the act, became void on the passing of the act. *Regina v. Vine.* 259

EXECUTORS AND ADMINISTRATORS.

1. The deceased by his will made his wife sole executrix and residuary legatee. By a codicil he devised and bequeathed to A. B. all property held by him upon any trust or by way of mortgage. The deceased died insolvent, and the widow renounced probate of the will and codicil as executrix, and administration as residuary legatee. The court granted administration with the will and codicil annexed, to A. B., limited to the trust property so far as it was personally left to him by the codicil. *Goods of Prothero.* 671

See WILLS, 678.

WRONGFUL DEATH, 310.

F

FACTOR.

1. A warehouse-keeper who has goods deposited with him as such is not "an agent intrusted with the possession" of them, within the Factors Act, 5 & 6 Vict. c. 39, although he be also a broker, and is usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal.

One Slee carried on the business of a sheep's wool broker in Liverpool, and also that of a warehouse-keeper. In his capacity of warehouse-keeper he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for sheep's wool and goats' wool to arrive in Liverpool, which when landed was deposited in his warehouses, under directions to send the plaintiffs a report and valuation, but he was not authorized to sell without specific instructions. The sheep's wool so deposited with him was usually sold by Slee, and the proceeds received by him for the plaintiffs. The goats' wool Slee never sold, he not being a goats' wool broker.

Having wools of the plaintiffs of both descriptions in his warehouse, but not having received any instructions as to the sale of either, Slee professed to pledge the whole with the defendants, bankers in Liverpool, by a letter in which he undertook to hold them as trustee for the defendants, to secure the sum advanced:

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that Slee was not, as to any of the wools so agreed to be pledged, "an agent intrusted with the possession," within the Factors Act, 5 & 6 Vict. c. 39.

2. Per Blackburn, J.: The intention of the Factors Act, 5 & 6 Vict. c. 39, was, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges them, he should be deemed by that act to have misled any one who *bona fide* deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorized to sell the goods or to procure the advance.
3. Per Bramwell, B.: The statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed. *Cole v. North Western, etc.* 418

FELON.

See EXCISE, 259.

SERVICE, 688, 690 note.

FIXTURES.

1. A lessee of business premises having become insolvent, the trustee in liquidation put up the fixtures for sale by auction, under conditions which required them to be "cleared" by the purchaser in two days from the sale. The plaintiff bought the fixtures; but, with the knowledge of the trustee, allowed them to remain on the premises whilst he was treating with the landlord for a new lease. This negotiation fell through, and the trustee surrendered the premises to the landlord, who relet them, the fixtures still remaining affixed. About a fortnight afterwards the plaintiff, learning of the surrender, applied to the landlord for the fixtures. In an interpleader issue between the plaintiff and a person claiming title through the new tenant:

Held, that the plaintiff had not lost his right by delay or laches, and that he was entitled to the fixtures. *Saint v. Pilley*. 577, 581 note.

See TREES, 248 note.

FORECLOSURE.

See REDEMPTION, 719.

FOREIGN GOVERNMENT.

See JURISDICTION, 52, 65 note.

FOREIGN LAW.

See LEX LOCI.

FORFEITURE.

1. When courts will relieve from. 416 note.
 2. What waiver of. 416 note.
 3. Mortgage conditioned if interest not paid all to become due. 416 note
- 12 ENG. REP. 111

FORGERY.

See NEGLIGENCE, 617, 628 note.

FORMER SUIT.

1. On the 31st of December, 1839, certain uncollected rents belonging to the estate of a deceased person were sold by his executors to the respondent. In 1869, the appellant, claiming as residuary legatee under the will of the deceased, sued the respondent and the surviving executor to cancel the sale and for an account and payment, and after certain abortive negotiations for a compromise, foreclosed the pleadings in the action. Thereupon a "transaction" was on the 4th of June, 1870, made between the respondent and L., the counsel and attorney of the appellant, to the effect that the cause was stayed on certain terms of payment and the foreclosure removed, "*jusqu'à nouvel avis*," which "transaction," on the 10th of June, the respondent revoked and pleaded to the action. Thereafter the appellant prayed for judgment in terms of the compromise, which was refused.

In January, 1871, the appellant brought another action to enforce the compromise, and the respondent pleaded, first, that the pendency of the original action for substantially the same cause was a bar, or that the discontinuance thereof was a condition precedent to the right to maintain a fresh one; secondly, *res judicata*; thirdly, fourthly and fifthly, that the "transaction" was conditional on ratification by the court, was made by L. without appellant's authority, and under mistake, surprise, or fraud:

Held, first, that the pendency of the first action was not a bar to the institution of the second; nor was the discontinuance of the first a condition precedent to bringing the second. The right mode of enforcing the "transaction" was by a separate action.

2. Secondly, the "transaction" was intended to be final, but, according to the Canada Civil Code, interpreted by the aid of the French law, L., in the absence of special authority, had not, by reason of his being "*avocat*" and "*avoué*," any power to bind his client thereby.

8. As *avocat* can, however, bind his client (until *désaveu*) by any *proceeding in the cause*, though taken without his client's authority, or even in defiance of his prohibition. *King v. Pennocault*.

127, 145 *note*.

FRAUD.

1. A man twenty-six years of age, entitled to a reversion of £600, but wholly without present means, applied to a money lender, who advanced him £85 on a mortgage of the reversion for £100, with a provision that if default should be made in payment of the £100, the £100 should bear interest at 5 per cent. per month. Twelve years afterwards the reversion fell into possession, and on a bill filed by the personal representative of the mortgagor, a decree was made for redemption on payment of the sum borrowed and simple interest at 5 per cent. *Beynon v. Cook*.

769

See INSURANCE, FIRE, 846 *note*.
NEGLIGENCE, 617, 628 *note*.
WILL, 76, 101 *note*.

FRAUDS, STATUTE OF.

1. The defendant's son, H., junior, gave a verbal order in London on the 18th of February, 1870, to the plaintiffs to send three cases of leather-cloth to the defendant at Cologne; the plaintiffs had been in the habit of forwarding goods to the defendant through H. & P., Rotterdam, and H., junior, being informed that the port of Rotterdam was blocked with ice, directed that the three cases should be sent through Messrs. G., Ostend. When the plaintiffs had executed the order Rotterdam was again open, and Messrs. G. had given up their Ostend route. The plaintiffs therefore forwarded the three cases through H. & P., via Rotterdam; and on the same day, the 1st of March, they forwarded the invoice from the plaintiffs to the defendant, giving the price, &c., with a letter, in which they said: "Inclosed we hand you invoice of three cases leather-cloth. This order came through Mr. H., junior, who

instructed us to send it through Messrs. G., Ostend, but as they have given up that route we have sent it through H. & P., Rotterdam, as before." The defendant received but did not answer this letter, but gave further orders for goods to the plaintiffs, which were forwarded via Rotterdam. The ship by which the three cases were sent was stranded and the goods damaged. On the 28th of June the plaintiffs wrote to the defendant, inclosing their statement of account, and requesting payment; and on the 5th of July defendant wrote to plaintiffs, acknowledging the receipt of the statement, and saying, "In looking over your statement I find you have charged me for goods which have been entirely lost in the sunk ship, being sent via Rotterdam. You state in your letter of March 1st that Mr. H., junior, instructed you to send the goods through Messrs. G., via Ostend, but on account of their having given up that route you sent, without any instructions, the goods via Rotterdam." Further correspondence ensued, and defendant having refused to pay for the three cases, an action was brought, and the above facts and correspondence appeared on the trial.

The judge ruled that there was sufficient memorandum in writing, signed by the defendant, of the contract; and left it to the jury to say, from the silence and subsequent conduct of defendant, whether or not there had been an assent by him to the change of route from Ostend to Rotterdam before the loss; and they found in the affirmative, and a verdict passed for the plaintiffs:

Held, that there was sufficient memorandum of the original contract; and that there was evidence from which the jury might find that the defendant had assented to the substituted performance in the change of route, which assent need not be in writing. *Leather, etc., Co. v. Hieronimus*.

211, 217 *note*.

2. Declaration that the plaintiff and defendant had been negotiating for the letting by the defendant to the plaintiff of a messuage, together with the use of the furniture therein, and the plaintiff objected to become tenant on the ground that the messuage was in imperfect repair and insufficiently furnished; that the defendant, in order to induce, as he in fact did thereby induce, the defendant to become forth-

with tenant to him of the messuage without requiring the defendant to do any repairs or sending additional furniture into the same previously to the creation of the tenancy, verbally promised the plaintiff that he would within a reasonable time after the creation of the tenancy do such repairs and send additional furniture into the messuage; and thereupon, afterwards, in consideration that the plaintiff, at the request of the defendant, had so forthwith become tenant to the defendant of the messuage without requiring the defendant to do any such repairs or to send into the messuage any such additional furniture, the defendant promised the plaintiff that he would, within a reasonable time, do such repairs and send such additional furniture into the messuage. Averment of conditions precedent. Breach, that the defendant did not perform his last-mentioned promise:

Held, on demurrer, that the agreement declared on did not relate to an interest in land within s. 4 of the Statute of Frauds (29 Car. 2, c. 3); and an action could be maintained upon it though not in writing. *Angell v. Duke*. 286, 241 note.

3. The defendants, a municipal corporation, were possessed of a dock of which they allowed the use to ships needing repairs, under certain printed regulations. The plaintiff entered into a parol agreement with the defendants for the use of the dock, upon the terms of such regulations. By these regulations it was provided that the dock should be "let" to parties requiring the same for the repair of vessels at such rates as the council of the borough should from time to time sanction, and that vessels entered in a book kept by the borough treasurer should be allowed to enter the dock, as far as possible, according to the order of entry in the book. The regulations contained provisions that the defendants should be entitled to detain the vessel in the dock until the dockage was paid, that the corporation foreman should open and shut the dock gates, and various other provisions tending to show that the defendants intended to retain possession of and control over the dock while in use by vessels. The defendants did not admit the plaintiff's vessel into the dock in her turn:

Held, in an action for breach of contract by the plaintiff against the defen-

dants, that the contract was not for an interest in land within the 4th section of the Statute of Frauds, and therefore need not be in writing; and, secondly, that the contract need not be under the seal of the corporation. *Wells v. Mayor, etc.* 463

4. In an action to recover the price of clocks sold by the plaintiff to the defendant, it appeared that the plaintiff's traveller when he took the order for the goods wrote out in the presence of the defendant upon printed forms two memoranda of it, putting the defendant's name upon them, and handing one of the papers to the defendant, who kept it:

Held that there was no evidence that the plaintiff's traveller signed the memoranda as agent of the defendant so as to bind him within s. 17 of the Statute of Frauds. *Murphy v. Boese*.

567, 572 note.

FREIGHT.

See ADMIRALTY, 645.

G

GIFT.

1. A testatrix, both before and after she made her will, purchased sums of stock in the names of herself and the son of her daughter-in-law. By her will she gave the residue of her estate to her daughter-in-law for life, and after her death to the son and the daughter of the daughter-in-law:

Held, that, under the circumstances, the sums of stock so purchased were a gift to the son of the daughter-in-law:

2. *Held*, that in such a case the evidence of the son and his wife was admissible, and could not be disregarded as rebutting the presumption of a resulting trust; and that, coupled with the circumstances under which the stock was purchased, it was sufficient to rebut the presumption:

3. *Held*, on the facts, that the testatrix had not placed herself in loco parentis

to the son of her daughter-in-law or to the other residuary legatee, and that both these facts would have to be proved to make the gift an ademption of the residuary bequest. *Howkes v. Pascoe*. 750, 760 note.

GRANT.

1. A landowner, who has demised for a term of years the right of shooting over his lands, is not thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting. *Gearns v. Baker*. 760

See EASEMENT, 250, 256 note.

H

HABEAS CORPUS.

See CRIMINAL LAW, 181.

HEARING IN PRIVATE.

See DIVORCE, 686.

HEIR.

See FRAUD, 769.

HIGHWAY.

See NEGLIGENCE, 275.

HUSBAND AND WIFE.

1. A woman having a sum of money deposited with a merchant, and standing in her name, married a man whom she

afterwards accompanied on a voyage, and both were drowned at the same time. The money was transferred by the merchant into the names of the husband and wife; but the only direction given to the merchant by the husband was to keep this property separate from his other moneys. The husband by his will, after reciting that his wife had previously to her marriage deposited with the merchant this money, which was standing in her name, disposed of the property as his own:

Held, that the husband had done no act to reduce the wife's money into possession, and that it would go to her personal representatives. *Scrutton v. Pathillo*. 803

See MARRIED WOMEN, 803.

I

IDIOTS.

See LUNATIC, 699.

TRUSTS AND TRUSTEES, 724, 725.

ILLEGAL AGREEMENTS.

1. Tenders for the supply of stone having been invited by a corporation, it was agreed between A., B., C., and D., quarry owners, that B. should not tender, that C. and D. should tender above A.'s price, that A. should purchase certain quantities of stone from B., C., and D. at a fixed price, and that B., C., and D. should not supply the corporation with stone during 1875.

The stone was purchased as agreed, by A., but B., in breach of the agreement, sent in a tender, which was accepted:

Held, on demurrer, that the agreement was not void, and that a bill would lie by A. to restrain B. from supplying the corporation directly or indirectly during 1875 with stone, without making the corporation parties. *Jones v. North*. 826

See DURESS, 736, 741 note.

IMPLIED INDEMNITY.

See INDEMNITY, 316, 322 note.

INCIDENT.

See GRANT, 760.

INDEMNITY.

1. The plaintiffs were in possession of certain trucks, which were claimed by the defendant, and also by the proprietors of the K. P. Colliery. A correspondence took place between the plaintiffs and the defendant, in which the plaintiffs asked for an indemnity if they should deliver up the trucks to the defendant. The defendant, without giving any answer as to the indemnity, wrote requiring the plaintiffs to send the trucks back to him, which they thereupon did. The K. P. Colliery proprietors then brought an action against the plaintiffs for conversion of the trucks, and their claim proving well founded, the plaintiffs were obliged to pay a sum of money, in settlement of the action, which they sought to recover from the defendant upon a contract of indemnity :

Held, following the doctrine laid down in *Betts v. Gibbins* (2 Ad. & E. 57) and *Toplis v. Grane* (5 Bing. N. C., 636), that there was, under the circumstances of the case, evidence of an implied promise to indemnify.

2. The principle upon which in such cases a contract of indemnity is implied is not confined to cases of principal and agent, or employer and employed. *Dugdale v. Lovering*. 316, 322 note.

INJUNCTION.

See GRANT, 760.

ILLEGAL AGREEMENT, 826.

INNKEEPER.

1. A. went to the defendant's inn and stayed there with his family for some

time; he took with him to the inn a piano as his own which he had hired of the plaintiff. A. having left the inn in debt to the defendant, the defendant claimed as against the plaintiff to detain the piano by virtue of his lien as innkeeper :

Held, affirming the decision of the Court of Queen's Bench, that, whether the defendant as innkeeper was bound to take in the piano or not, having done so he had a lien upon it. *Threfall v. Borwick*, 266, 268 note.

See EXCISE, 259.

INSURANCE.

See NOTICE, 386.

INSURANCE, FIRE.

1. Under the terms of a lease the tenant was bound to insure against fire, and had an option of purchasing the property. He insured in a sufficient sum. The premises were damaged by fire, and it then appeared that the landlord had a policy on the premises in another office, of which the tenant had no notice. The two offices apportioned the amount of loss between the two policies, and the landlord received what was thus payable under the policy effected by him. The tenant shortly after the fire gave notice to exercise his option of purchase, and proposed that the insurance moneys under both policies should go in part payment of the purchase-money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and insisted on the money under the other policy being applied in reinstating the premises, and on the tenant declining to do this brought ejectment against him :

Held, that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in reinstating the property after the tenant had exercised his option of purchase. *Reynard v. Arnold*.

766

2. A fire insurance was effected in respect of certain property through an agent

named Donald, who inspected the premises. One condition of the policy was, that any material misdescription of the property would render the policy void. The buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slate but with tarred felt. The company alleged that Donald was not their agent, but the agent of the insured; and that the misdescription rendered the policy void:

Held, that the misdescription was immaterial, and not sufficient to vitiate the policy; but that if material, it was made by Donald, as the agent of the insurance company, and the insured were not responsible for it. *In re Universal, etc.* 846, 860 *note*.

INSURANCE, MARINE.

1. The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity; such circumstances as, after sufficient examination of her condition, after every exertion in his power, within the means at his disposal, to extricate her from peril or to raise funds for the repair, leave him no alternative but to sell her as she is.
2. Rule made absolute (reversing the order of the Supreme Court) for a new trial, on the ground that the verdict in favor of the insured was against the weight of the evidence as to the necessity for sale. *Cobequid v. Bartheaux*. 201
3. On the 24th of November, 1871, V. Brothers insured with defendants in London a cargo of linseed, belonging to them, then on board a brig at Constantinople, for a voyage thence to a port of call and discharge in the U. K. to be named, including all risks of craft or lighters to and from the brig, each lighter to be considered as if separately insured, the policy expressing the agreement to be with V. Brothers and their assigns. The linseed was shipped under a bill of lading, whereby it was to be delivered at a safe port in U. K. to V. Brothers or assigns. Whilst the brig was on the voyage the agents of V. Brothers, on the 17th of February, 1872, sold in London to plaintiffs the cargo of

linseed; by the sold-note the seed was to be delivered at destined port in sound merchantable condition, and paid for in fourteen days from being ready for delivery by cash less 2½ per cent. discount, or at seller's option on handing shipping documents, less interest at 5 per cent. The vessel to go to any safe floating port in U. K. The bill of lading was indorsed to plaintiffs. On the 21st of February, plaintiffs named a safe floating port, and on the arrival of the brig at the port the cargo was landed by public lighters employed by plaintiffs; on the 28th of February, one of the lighters was sunk off the plaintiffs' wharf, being a loss within the terms of the defendants' policy. The loss occurred when part only of the cargo had been discharged, and before plaintiffs had paid the price of the cargo. In June, 1872, the policy was handed by V. Brothers to plaintiffs; and on the 17th of October V. Brothers indorsed on it an assignment to plaintiffs, and they brought an action upon it to recover for the loss of the seed in the lighter:

Held, that the plaintiffs could not recover. The policy was not expressly agreed to be assigned to plaintiffs by the sold-note; and no such intention could be inferred from the terms of the note, inasmuch as it was necessary that V. Brothers should keep the policy for their own protection until right delivery of the cargo. When the seed was put on board the lighter employed by plaintiffs, the seed was delivered to plaintiffs, and V. Brothers' interest ceased and the policy lapsed; and the subsequent assignment by V. Brothers to plaintiffs was, therefore, of no avail under 31 & 32 Vict. c. 86, s. 1. *North, etc.*, v. *Archangel, etc.* 282

4. A policy of insurance on a cargo of wheat shipped from Varna to Marseilles contained the usual memorandum against average unless general, and the following term "general average as per foreign statement."

The ship, after starting from Varna, met with heavy weather, and was forced to carry a great press of canvas to avoid a lee-shore. This caused her to strain very much, and having sprung a leak and become otherwise disabled, she was brought to the port of Constantinople. It was found, on a survey, that a fifth of the wheat had been damaged; and the surveyors recommended that the

voyage should end at Constantinople, and the damaged part of the wheat should be sold, and the rest transhipped to Marseilles. It appeared that the repairs necessary for the ship would have taken from one to two months. Under these circumstances, the recommendation of the surveyors was carried out and an adjustment of average in respect of ship and cargo was made at Constantinople. In such adjustment the damage which the cargo of wheat had sustained was treated as general average, and in accordance with such average adjustment a certain sum of money became payable by the underwriters upon the policy. The law by which the adjustment ought to have been regulated according to the law and usages prevailing at Constantinople under the circumstances was the law of France, and the average adjustment was made up in all respects in conformity with such law. In an action on the policy by the owners of the wheat, the defendants paid into court sufficient to cover the plaintiffs' claim on all the items of the average adjustment except the damage to the wheat which, by the law of England, would not under the circumstances be a general average loss:

Held, in a special case stated in the action (affirming the decision of the court below), that the voyage was rightly brought to an end at Constantinople, and the average adjusted there, and that the defendants were liable in respect of the damage done to the wheat. *Mavro v. Ocean, etc.* 473

5. An underwriter "on goods" may re-insure by the same description; and the policy need not be expressed to be a re-insurance. *Mackenzie v. Whitworth.* 582

INTENT.

See CRIMINAL LAW, 230, 234 note.

J

JOINT DEBTORS.

See LEX LOCI, 306.
SET-OFF, 358.

JOINT WRONGDOERS.

1. When two liable as, and when not. *Armstrong v. Lancashire, etc.* 508, 514 note.

JUDGMENT.

See CRIMINAL LAW, 181.

JUDICIAL.

1. When public officer acts judicially. *Cheetham v. Mayor.* 324

JURISDICTION.

1. If a trust fund is in the Court of Chancery, that court may proceed to administer it, even although a foreign sovereign may be interested in it, and may not think fit to come before the court in a suit relating to it. *Morgan v. Lariviere.* 52, 65 note.

L

LANDLORD AND TENANT.

1. A lease of a farm contained a covenant on the part of the lessee not to "assign or demise to or permit any other person to occupy the premises, or any part thereof, without the consent in writing of the lessor," and a proviso for re-entry by the lessor for any breach. By agreement in writing the lessee underlet a portion of the farm to one T. for one year from the 31st of January, 1873, and the lessor, on the 30th of September, 1873, with knowledge of the underletting, distrained for and received rent due on the 29th:

Held, that the lessor had waived the breach of the covenant not to "assign or demise" without consent; and that the permitting T. to remain in the occupation of the land during the remainder of the year was not a new or continuing breach of the covenant not

to "permit any other person to occupy" without consent. *Walrond v. Hawkins*. 408, 416 note.

2. When covenant not to underlet broken and when one consent to, destroys covenant. 416 note.

3. How far courts will relieve from forfeiture. 416 note.

4. What waiver of forfeiture. 416 note.

5. A written agreement for the letting of certain premises expressed the tenancy to be "for a year certain, and so on from year to year until a half-year's notice should be given by or to either party, at a yearly rent of £50 payable quarterly, the first payment to be on the 25th of March next." The agreement was dated the 20th of December, 1872, and specified no date for the commencement of the term:

Held, that a notice to quit given by the landlord on the 24th of June, 1874, was a good notice. *Sandil v. Franklin*. 439

See FIXTURES, 577, 581 note.

INSURANCE, FIRE, 766.

VENDOR AND VENDEE, 479.

LAW OF NATIONS.

See JURISDICTION, 52, 65 note.

LEASE.

See FRAUDS, STATUTE OF, 463.

VENDOR AND VENDEE, 479.

LEGACY.

See REAL ESTATE, 837.

WILL, 672, 763.

LEX LOCI.

1. To an action against a single defendant, for a breach of an agreement to build a vessel entered into between the plaintiffs and C. & Co., the defendant pleaded that there was a trading partnership or firm domiciled and carrying on business in

Scotland by the name of C. & Co., and that the agreement was an agreement made in Scotland by the plaintiffs with the firm, and was to be performed wholly in Scotland without the jurisdiction of the English courts and within the jurisdiction of the Scotch courts; and by the law of Scotland the firm was and is a distinct person from any or the whole of the individual members of whom it consists and of whom the defendant is one; and the firm, by the law of Scotland, is capable of maintaining the relation of debtor and creditor separate and distinct from the obligations of the partners as individuals, and can hold property, and has the capacity of suing and being sued as such separate person by the name of C. & Co.; that the agreement was made by the firm as such separate person and not jointly and severally by the individual members thereof; that at the date of the agreement the firm consisted of certain individual members, who are all domiciled in Scotland; and that by the law of Scotland the defendant was, as a partner in C. & Co. in the making of the agreement, liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual partners jointly for any breaches of the agreement, and it is a condition precedent to any individual liability attaching to the defendant as an individual member of the firm in respect of the agreement that the firm, as such person, or the whole individual partners jointly, should first have been sued and that judgment should have been recovered against the firm or the whole of the partners jointly, and that the plaintiffs have not sued the firm of C. & Co. nor the whole of the partners jointly, nor recovered judgment against it or them:

Held, on demurrer, that the matters stated in the plea were matters of procedure, and that the plea was therefore bad. *Bullock v. Caird*. 306

LIBEL.

See DISCOVERY, 273.

LICENSE.

See EXCISE, 259.

LIEN.

1. A contract for the building of a ship provided that the purchase-money was to be paid by instalments, partly in cash and partly by means of bills of exchange, to be paid and given at specified stages of the progress of the construction, the balance being paid on completion by a bill. The ship was from the time of paying or giving the first instalment to be the absolute property of the purchaser to the extent of his advances, subject nevertheless to the builder's lien for any unpaid instalments. Any bills given during construction were to be retired by the purchaser at completion and transfer. As the construction of the ship went on, the vendor drew bills upon the purchaser, which he accepted, for the instalments of purchase-money. After these bills had been negotiated, but before any of them became due, the purchaser took proceedings for liquidation, including his liability on the bills among his debts, and his creditors passed a resolution to accept a composition. The bill-holders refused to accept the amount of composition when tendered. The purchaser shortly after the resolution gave notice to the vendor to rescind the contract. Not long after this the vendor became bankrupt, and the ship was completed by his trustee. The bill-holders having claimed a lien on the ship:

Held (affirming the decision of the Chief Judge, reversing that of the County Court Judge), that the principle of *Ex parte Waring* was not applicable, and that the bill-holders had no lien on the ship. *Ex parte Lambton*.

782, 792 note.

See ATTORNEY, 458, 462 note, 736, 748.
INNKEEPER, 266, 268 note.

LIGHT.

1. In a suit to restrain the defendant from building so as to obstruct the plaintiff's ancient lights, it was proved that for a period of more than twenty years, extending to within a very short time before the bill was filed, there had been unity of possession of the properties of the plaintiff and the defendant, but there was no evidence of there ever having been any unity of title; and it was proved that before the unity of pos-

session commenced the access of light to the windows had been enjoyed as far back as living memory went:

Held (affirming the decision of the Master of the Rolls), that the plaintiff had established his title to the access of light, by proof of enjoyment from time immemorial, independently of the statute 2 & 3 Will. 4, c. 71; for that the statute does not take away any of the modes of claiming easements which existed before its passing:

2. *Held*, also, that the fact that some of the windows had been considerably enlarged did not take away the right to an injunction; and that the plaintiff ought not to be put upon the terms of restoring the windows to their former size. *Aynsley v. Glover*. 726

LIQUORS.

See EXCISE, 259.

LUNATIC.

1. A gentleman made a settlement of nearly the whole of his property in trust for himself for life, and then for four of his five children and their issue. About two years afterwards he was found lunatic. A son who took no benefit under the settlement desired to have it impeached, and adduced evidence showing that there was reasonable ground for contending that the settlor was of unsound mind when he executed it. The income of the lunatic was amply sufficient for his wants:

Held, that no proceedings ought to be directed at the expense of the lunatic's estate, but that the excluded son ought to be allowed to file a bill, as next friend of the lunatic, without giving security for costs, to impeach the settlement. *Matter of Gordon*. 699

See TRUSTS AND TRUSTEES, 724, 725.

M

MANSLAUGHTER.

See CRIMINAL LAW, 636, 638 note.

MARRIED WOMAN.

See HUSBAND AND WIFE, 808.

MASTER AND SERVANT.

1. At a meeting of the members of a highway board it was resolved that a path running through land in the occupation of the plaintiff was a highway, and that the plaintiff be directed to remove a lock from a gate placed across it. The surveyor of the board was afterwards ordered by them to remove the lock, and did so. On the trial of an action of trespass brought by the plaintiff against the members of the board in their personal capacity and the surveyor, in which the defendants justified, Kelly, C.B., nonsuited the plaintiff on the ground that neither the members of the board nor the surveyor were liable individually. No evidence was therefore given in support of the plea of justification. The Court of Exchequer (Kelly, C.B., dissenting) having set aside the nonsuit and ordered a new trial on the ground, first, that assuming that the resolution was illegal the members of the board who concurred in it were personally responsible; secondly, that the fact that the surveyor was, by 25 & 26 Vict. c. 61, s. 18, bound to obey the orders of the board, did not excuse him if in obeying their orders he did an unlawful act:

Held, by the Exchequer Chamber (expressing no opinion as to the liability of the members of the board), that the surveyor was liable, and that the judgment setting aside the nonsuit must therefore be affirmed. *Mill v. Hawker*. 538, 544 note.

See APPRENTICE, 280.

MINES.

1. A piece of land on which a cotton mill was to be built was conveyed, the grantor reserving to himself a chief rent, and reserving all mines and minerals under the piece of land, and power to take the same at pleasure, making compensation for damages to be done to

the cotton mill. The grantee covenanted to build and keep in repair the cotton mill:

Held, that the grantor would not be restrained from working and taking the minerals under the piece of land, though the buildings on the piece of land would necessarily be thereby injured. *Aspden v. Seddon*. 773

See WILL, 808.

MISTAKE.

See CONSIDERATION, FAILURE OF, 399.

MONEY HAD AND RECEIVED.

See BANKRUPTCY, 830.

CONSIDERATION, FAILURE OF, 399.

MONEY PAID.

See VENDOR AND VENDEE, 479.

MORTGAGE.

1. A mortgage of a foundry, with the engines, fixtures, machinery, tools, and working plant therein, described the chattels assigned as being "more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto, and read and construed as forming part of these presents." The deed contained no mention of stock-in-trade. The inventory, which was signed by the mortgagors on the same day as the deed, extended over twenty-one pages. The first twenty pages contained a detailed description of the engines and other chattels which were mentioned under general heads in the deed. At the bottom of page 20 was this clause: "The stock-in-trade consists of bolts, brass work, wrought and cast iron work, brass and other work, both finished and in preparation." And at the top of page 21 were these words: "Also all

cast and wrought iron, steel, timber, and all other stock-in-trade in and upon the before-mentioned foundry, workshops and premises." Then came this clause: "The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils, and things in, upon, or about the foundry mortgaged by us this day." This was immediately followed by the signatures of the mortgagors:

Held (affirming the decision of the Chief Judge), that the stock-in-trade was not included in the mortgage. *Matter of Jardine*. 743

See BANKRUPTCY, 714.
FRAUD, 769.
REDEMPTION, 719.

MORTGAGE FORECLOSURE.

See REDEMPTION, 719.

MUNICIPAL CORPORATIONS.

1. The 38th section of the Manchester Improvement Act, 30 Vict. c. xxxvi., enacts that, "if the surveyor of the city, or in his absence, any other duly qualified surveyor, shall certify in writing that there is imminent danger from any building, the corporation shall and may, without any presentment, notice, or other formality, cause the same to be taken down either wholly or in part; or to be repaired or secured in such manner as the corporation shall think requisite;" and by s. 39 the expenses incurred are recoverable from the owner. The city surveyor having certified that there was imminent danger from a building of which the plaintiff was the owner and occupier, the town-clerk, assuming to act on behalf of the corporation, issued a direction to the surveyor "to cause the building mentioned in his certificate to be taken down or repaired in such manner as he should think requisite." The surveyor thereupon employed a builder to take down and rebuild certain parts of the building, who was paid by the corporation for so doing: and the corporation afterwards recovered the amount from the plaintiff:

Held, that the certificate of the surveyor was conclusive, and could not be questioned in an action to recover back the money so paid.

2. *Held*, also, that the acts of the surveyor, authenticated by the town-clerk, were the acts of the corporation; or that, at all events, they were ratified and adopted by them so as to justify what was done under the certificate.

3. The certificate and notice referred generally to the "building," No. 95 Market Street: the premises dealt with consisted, besides No. 95 Market Street, of other premises adjoining thereto, being No. 2 Palace Street, for which the plaintiff was separately rated, but connected therewith by internal communications, and occupied therewith by him as one set of business premises:

Held, that the description in the certificate and notice was sufficient to cover both sets of premises. *Cheetham v. Mayor, etc.* 324

See ORDINANCES, 218, 226 *nota*.
WARRANTY, 555.

N

NEGLIGENCE.

1. As the plaintiff was riding along a highway, under which was a sewer, his horse trod on a grid, or grating, put there to drain the surface-water off the road into the sewer. The grid being in a defective state gave way, and the horse's leg was injured. Plaintiff brought an action against the Local Board of Health of the district, who are the surveyors of the highway, by ss. 68, 117, of 11 & 12 Vict. c. 63, and in whom also the sewers are vested under ss. 43, 45:
Held, that, though the defendants might not be liable as surveyors of the highway they were liable as owners of the sewer, of which the grid formed part, for negligence in not keeping the grid in a proper state. *White v. Hindley Local, etc.* 275
2. When and how far stepping off a railway car in motion is, when one goes to

train with another protected, and duty of company to a lady. *Robson v. North Eastern, etc.* 302, 306 note.

3. The plaintiff, one of the travelling inspectors of the carriage and wagon department of the L. and N. W. Railway Company, was travelling under a pass from them, in one of their carriages, on a journey from Leeds to Manchester. Near C. Station, and on the line of the defendants, over which the L. and N. W. Railway had running powers, the train in which the plaintiff was travelling came into collision with a number of loaded wagons which were being shunted from a siding by the defendants, and he was injured. There was evidence of negligence on the part of the driver of the plaintiff's train in travelling at too great a speed, so as to be unable to stop when he came in sight of the danger signal, which had been hoisted by the defendants.

The jury found that the accident was caused by the joint negligence of the defendants and the L. and N. W. Railway Company:

Held, that the plaintiff was so far identified with the L. and N. W. Railway Company that he could not recover:

4. *Semble*, that the evidence did not support the finding of the jury with regard to the defendants, but showed that the L. and N. W. Railway were solely responsible for the accident. *Armstrong v. Lancashire, etc.* 508, 514 note.
5. The plaintiffs, colliery owners, had a siding adjoining the defendants' line, which was crossed by a bridge, and on to which the defendants were in the habit of conveying the plaintiffs' empty trucks from their line, the plaintiffs removing them as they thought fit. The defendants were accustomed to bring such empty trucks along their main line at any hour by day or night, and, without notice to the plaintiffs, to shunt such trucks on to the siding and leave them there to be disposed of by the plaintiffs. One Saturday evening, after working hours, the defendants brought on to the plaintiffs' siding and left there trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at the plaintiffs' works, the defendants, after dark,

pushed on to the siding other trucks of the plaintiffs which pushed the loaded truck up to the bridge, by which means the further progress of the train of trucks was checked. The engine-driver, believing that the obstruction was caused by a break, drew back the engine, and gave with it such a push to the train that the loaded truck knocked down the bridge. In an action for the damage so done, the jury found that the plaintiffs were guilty of contributory negligence in not removing the loaded truck:

Held, by the majority of the Exchequer Chamber (Denman, J. dissenting), reversing the decision of the Court of Exchequer, that there was evidence of contributory negligence to go to the jury. *Radley v. London, etc.* 544

6. The defendant, the salaried manager of a bank, was appointed treasurer to guardians of the poor under the Poor Law Consolidated Order. A treasurer's account between him and the guardians was duly kept according to the Poor Law Orders; moneys were from time to time paid into the bank of which he was manager to the account of the guardians, and orders signed by the guardians in conformity with the orders were cashed like checks payable to order. The defendant received no salary or remuneration, and the guardians received interest on their balance when it exceeded £3,000.

A person in the service of the clerk to the guardians, who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces; and after signature of the orders he increased the amounts accordingly. He also forged indorsements to orders so increased in amount, and to others not so increased, and obtained payment of them at the bank.

On a case stated by an arbitrator in an action brought by the guardians against the defendant for the amount of the orders so paid, it was found as a fact that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the plaintiffs and their clerk in signing the orders fraudulently prepared for their signature:

Held, first, that the negligent draw-

ing of the orders disentitled the plaintiffs to complain of the payment of the excess;

7. Secondly, that as to the payment on forged indorsements the account at the bank was in effect the plaintiffs' account; that the bank was protected by 16 & 17 Vict. c. 59, s. 19; and that as by the act and direction of the plaintiffs the only receipt of moneys on their behalf was a receipt by the bank, the defendant was not chargeable in any other way than as the bank was chargeable; and further, that if the account at the bank were regarded as the defendant's account, still being so kept by the order of the plaintiffs, they could not make any claim against him which he could not enforce against the bank. *Halifax Union v. Wheelwright*. 617, 628 note.

NEGOTIABLE INSTRUMENTS.

1. When bonds are and who are *bona fide* holders thereof. *Dow v. Black*, 156, 165 note.
See BONDS, 525, 534 note.

NOTICE.

1. In 1845 R. effected a policy for £1,000 upon his life, and assigned it by way of mortgage to G. In 1858, W. (who was G.'s attorney) went to the office to pay a premium and to confer with the secretary upon other business connected with the office, and then informed him of the assignment. In 1862 R. became a bankrupt, and he died in 1871. After the death of R. the office for the first time had notice of his bankruptcy:

Held,—upon a special case, the court to draw inferences of fact,—that the conversation between W. and the secretary in 1858 was a sufficient notice to the office that the policy had been assigned and was not in the order and disposition of R.; the statute requiring such notices to be in writing not being at that time in existence. *Alleton v. Chichester*. 386

See BANKRUPTCY, 830.
LANDLORD AND TENANT, 439.
MUNICIPAL CORPORATIONS, 324.

O

OCCUPATION.

See CHATTEL MORTGAGE, 524.

OFFICER.

See MASTER AND SERVANT, 538, 544 note.
WARRANTY, 555.

OPTION.

See AGREEMENT, 295, 296 note.

ORDINANCES.

1. A local board of health made by-laws, under s. 34 of the Local Government Act, 1858 (21 & 22 Vict. c. 98): "6th. Every person intending to erect any new building shall give fourteen days' notice, to be delivered to the board's surveyor, or left at his house, with detail plans and sections, and any person who shall erect any new building without delivering such notice and plans and sections, or without having the plans, &c., approved by the board, shall be liable to a penalty of 40s." By by-law 36, the board may cause to be altered or pulled down any building begun or done in contravention of the by-laws:

Held, that the 6th by-law was within the powers conferred by s. 34, and was reasonable, and therefore valid. *Hall v. Nixon*. 218, 226 note.

P

PARENT AND CHILD.

1. *Per THE LORD CHANCELLOR* (Lord Cairns): The act of Parliament has given the court the widest discretion to weigh the comparative advantages or disadvantages of giving the custody of

all, or of any of the children, to the one parent, or to the other; and I am at a loss to conceive how any general rule can be laid down. It is the duty of the court to consider all the circumstances of the particular case.

2. *Per THE LORD CHANCELLOR*: Grave as the offence in this case was, there appears to be no continuance of immorality. It is proved that the husband is affectionately attached to his children, and has always been so. He is engaged in a profitable business. I cannot perceive that an order which should take from him the custody of his sons would be conducive to their future welfare. It is a very different matter with regard to the daughters. Their mother, against whom nothing has been proved, is the natural person to have their custody.

8. *Per LORD O'HAGAN*: The father did not lead an openly immoral life, but had the character of a religious and upright man. He had a genuine love for his children, and exhibited a watchful care of them; and there does not seem any reasonable ground for anticipating that the male children will be injured if their custody be with their father; especially as they are of sufficient age to be kept at school.

4. *Per LORD SELBORNE*: Looking to the moral interest of these boys, I am not satisfied that it will be compromised by leaving them in the care of him who is their natural and legal guardian, and on whom their material interest must mainly depend. *Symington v. Symington*. 109, 123 *note*.

PAROL EVIDENCE.

1. How far admissible to aid in construction of, or to show mistake in, wills. *Charter v. Charter*. 1, 21 *note*.

2. When admissible and when not. 245 *note*.

See FRAUDS, STATUTE OF, 236, 241 *note*.

PARTNERSHIP.

See ILLEGAL AGREEMENT, 826.
LEX LOCI, 806.

PASS.

See CARRIER, 268, 278 *note*.

PATENT.

1. An agreement by the vendor of a patent to assign to the purchaser all future patent rights which the vendor may hereafter acquire of a like nature to the patent sold, is not contrary to public policy. *Printing, etc., Co. v. Sampson*. 841

PAYMENT.

See BANKRUPTCY, 838, 837 *note*.

PERFORMANCE.

See FRAUDS, STATUTE OF, 211.
SALE, 631.
TITLE, 345, 357 *note*.

PERSONAL ESTATE.

See REAL ESTATE, 837.

POSSESSION.

See SALE, 451, 456 *note*, 631.

PRECATORY TRUST.

See WILL, 67.

PREFERRED STOCK.

See ULTRA VIRES, 798, 802 *note*.

PRESCRIPTION.

See LIGHT, 726.

PRINCIPAL AND AGENT.

See CORPORATIONS, 148, 154 *note*.
FACTOR, 418.

See FRAUDS, STATUTE OF, 567, 572 *note*.
INSURANCE, FIRE, 846, 860 *note*.
NEGLECT, 617, 628 *note*.
WARRANTY, 555.

PRINCIPAL AND SURETY.

1. Where the acceptor of a bill of exchange presents a petition for liquidation or composition under the Bankruptcy Act, 1869, and the creditors pass a resolution for liquidation or composition, the acceptor must be considered as discharged by operation of law, and the drawer is thereby not discharged from his liability. In such a case it makes no difference whether the billholder is present at the meeting or not, or whether he votes in favor of the resolution or against it. *Matter of Jacobo*. 707, 711 *note*.

See BANKRUPTCY, 704.

PRIVATE HEARING.

See DIVORCE, 686.

PROFITS.

See WILL, 808.

PROHIBITION, WRIT OF.

1. When a superior court is clearly of opinion, both with reference to the facts and the law, that an inferior court is exceeding its jurisdiction, it is bound to grant a writ of prohibition; whether the applicant for the prohibition is the defendant below or a stranger. In such a case, neither the smallness of the claim in the suit below nor delay on the part of the applicant is a reason for refusing the writ. The plaintiff in the inferior court has in no case an absolute right to have the plaintiff in prohibition put to declare in prohibition. *Worthington v. Jeffries*. 440

PROMISSORY NOTES.

See BONA FIDE HOLDER, 592, 608 *note*.
NEGLECT, 617, 628 *note*.

PUBLIC OFFICERS.

See WARRANTY, 555.

R

RAILWAY COMPANY.

1. Where a passenger by a railway is invited to alight at a spot where there is no platform, so that the usual means of descent are absent, the duty of the railway company not to expose the passenger to undue danger requires them to provide some reasonably fit and safe substitute; and, in the case of a female passenger, a jury may reasonably find that the company fails in this duty where the only means of alighting provided are the usual iron step and footboard, with no attendants to assist the passenger in alighting.
2. Plaintiff, a female, was a passenger by defendants' railway to B., a very small station; on the arrival of the train at the station, the engine and part of the carriage in which plaintiff was riding were driven past the end of the platform which is short, and came to a standstill; the door of the plaintiff's compartment being beyond the end of the platform. Upon the train stopping, plaintiff rose and opened the door, and stepped on to the iron step: she looked out and saw the station-master, who is the only attendant kept there, taking luggage out of or putting luggage into a van. She did not see the guard or any other railway servant, and she stood on the step looking for somebody to help until she became afraid of the train moving away; and, no one then coming, she tried to alight by getting on to the footboard; she had her back to the carriage, and she had hold of the door with her right hand, and got one foot on to the footboard, and whilst en-

deavoring to get the other foot on to the foot board she lost her hold of the carriage-door, and slipped, and fell, and was injured. She had a small bag on her left arm, and an umbrella and two small articles in her left hand, but nothing in her right hand. The judge having nonsuited the plaintiff on the above evidence, with leave to enter a verdict for the plaintiff:

Held, first, that there was evidence from which a jury might have properly found that the plaintiff was invited or had reasonable ground for supposing she was invited to alight by the company's servants; and that the defendants had failed in their duty towards the plaintiff, and had not provided a reasonable substitute for a platform.

3. *Held*, secondly, that the jury might not improperly have found that the expectation of being carried beyond the B. station was reasonably entertained by the plaintiff, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting; and that the defendants were therefore liable for the injury resulting from the plaintiff's act, which had been caused by their negligent breach of duty. And that the nonsuit was therefore wrong, and the verdict ought to be entered for the plaintiff. *Robson v. North, etc.* 302, 306 note.

See CARRIER.

NEGLIGENCE, 508, 514 note, 544.

RATIFICATION.

See MUNICIPAL CORPORATIONS, 324.

REAL ESTATE.

1. A voluntary covenant to secure by will the payment of a sum of money to be applied for charitable purposes cannot be satisfied out of the impure personality of the covenantor; and the debt created by the covenant must, like a legacy, abate in the proportion of the impure to the pure personality. *Fox v. Lowndes*, 887.

RECEIVER.

See BANKRUPTCY, 714.

REDEMPTION.

1. The rule that the dismissal of the bill in a redemption suit operates as a foreclosure of the mortgage does not apply to an equitable mortgage by deposit of title-deeds.

A mortgagor filed a bill for the redemption of a legal mortgage. The mortgagee, by his answer, alleged that he had advanced another sum of money on the deposit of the title-deeds of another estate, and he claimed to hold both estates till both debts were paid. The plaintiff amended his bill by stating the allegations made by the defendant, but before the bill came to a hearing he obtained an order, *ex parte*, dismissing the bill with costs. The mortgagee afterwards contracted to sell both the estates, and then filed a bill for the administration of the estate of the mortgagor, who was dead, praying for permission to carry out the sale, and for payment of his whole debt out of the mortgagor's estate:

Held (affirming the decision of Hall, V.C.), that the equitable mortgage was not foreclosed, and that the plaintiff was entitled to the relief prayed for. *Marshall v Shrewsbury*. 719

RELIGIOUS SOCIETIES.

See CHURCH DECORATIONS, 670.

REMEDY.

See LEX LOCI, 306.

RENT.

See BANKRUPTCY, 714.

RES ADJUDICATA.

See FORMER SUIT, 127.

REVERSIONER.

See FRAUD, 769.
WILL, 808.

REVIVOR.

See ABATEMENT, 515, 519 *note*.
WRONGFUL DEATH, 810.

REVOCATION.

See WILL, 672.

S

SALE.

1. Where goods were sold by sample, and the bulk was found by the purchaser on inspection after delivery not to be equal to sample:

Held, that the purchaser might reject the goods by giving notice to the vendor that he would not accept them, and that they were at the vendor's risk, and was not bound to send back, or offer to send back, the goods to the vendor, or to place them in neutral custody. *Grimaldy v. Wells*.

451, 456 *note*.

2. The defendants in October, 1870, contracted to sell to the plaintiffs 2,000 tons of iron "delivery in monthly quantities [of 166½ tons] over 1871, or sooner if required;" payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December, 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the

defendants accordingly only made partial deliveries during the several months of 1871, up to and including November. In December the plaintiffs required delivery of the residue of the whole 2,000 tons. The defendants refused it, and denied that they were liable to deliver any more iron under the contract, except what was due on the monthly balance. The plaintiffs then brought an action for non-delivery.

The majority of the Court of Exchequer (Kelly, C.B., and Pigott, B.) held that the plaintiffs having themselves requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2,000 tons in December, and were therefore not entitled to recover; but Martin, B., dissenting, held that the original contract had not been put an end to by the plaintiffs' application to the defendants not to deliver full monthly quantities between February and November, 1871, and that the defendants were bound to deliver the whole 2,000 tons under their contract:

3. *Held*, by the Exchequer Chamber, reversing the judgment of the court below, that, without deciding whether the defendants could be required to deliver in December at once the whole balance of the 2,000 tons, they remained liable to deliver it at some reasonable time, and not having asked for such reasonable time, but having repudiated their liability, they had no defence to the action. *Tyres v. Rosedale, etc.* 631

See DAMAGES, 296.

INSURANCE, MARINE, 262.

VENDOR AND VENDEE, 479.

SALVAGE.

See ADMIRALTY, 645

SEAL.

See FRAUDS, STATUTE OF, 463.

SELLING LIQUORS.

See EXCISE, 259.

SENTENCE.

See CRIMINAL LAW, 181.

SERVICE.

1. If the respondent be in prison, the court will not be satisfied with substituted service of the petition and citation to be made on an official of the gaol in which he is confined, unless there is a reasonable probability that the contents of those documents will thereby become known to the respondent. *Bland v. Bland*. 688, 690 note.

SET-OFF.

1. In an action for breach of a contract for the quick discharge of a ship made with several persons jointly, where some of the plaintiffs had made profits by reason of such breach of contract which they would not otherwise have made, through another ship in which they were interested having been substituted for the purpose for which the former ship was required:

Held, that the amount of the joint damages could not be reduced by the profits so made by some of the plaintiffs individually. *Jebson v. East, etc.* 358

SHIPPING.

See ADMIRALTY.

STATUTE, EX POST FACTO.

See EXCISE, 259.

STOCKHOLDERS.

1. A solicitor who was promoting a railway company induced various persons to sign the subscription contract, by an assurance that they should incur no liability if the line was not made. Some of these persons were provisional directors. The act was obtained, and contained the usual clause that the preliminary expenses should be paid by the company. The line was not made. The undertaking was abandoned, and the company ordered to be wound up. The solicitor carried in a claim as creditor for professional services in obtaining the passing of the act. This claim was opposed by some of the contributors, on the ground of the above assurances:

Held, (affirming the decision of Bacon, V.C.), that the solicitor was entitled to prove, for that the assurances made by him could only operate as a contract to indemnify the individuals to whom they were made, and did not exonerate the company in its corporate capacity. *Matter of Shaw's Claim*. 691, 699 note.

See CORPORATIONS, 148, 154 note.

ULTRA VIRES, 798, 802 note.

SUBPOENA.

See WITNESS, 701.

SUPPORT.

See MINES, 773.

SURETY.

See PRINCIPAL AND SURETY, 707, 711 note.

SURVIVOR.

See WRONGFUL DEATH, 310.

SUSPENSION OF PAYMENT.

See BANKRUPTCY, 888, 837, *note*.

T

TIMBER.

1. Reservation on sale of. 248 *note*.

TITLE.

1. The defendants contracted with the plaintiffs to make and supply new boilers and certain new machinery for a steamship of the plaintiffs, and to alter the engines of such steamship into compound surface condensing-engines, according to a specification.

The engines, boilers, and connections were, by the contract, to be completed in every way ready for sea so far as specified, and tried under steam by the engineers (the defendants) previous to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector.

The price of the work was to be £5,800, and was to be paid as the work progressed, in the following manner, viz., £2,000 when the boilers were plated, and £2,000 when the whole of the work was ready for fixing on board, and the balance, £1,800, when the work was fully completed and tried under steam. These payments were only to be made on the certificate of the plaintiffs' inspector. The old materials removed from the ship were to become the property of the defendants. The specification contained elaborate provisions as to the fitting and fixing the new boilers and machinery on board the ship, and the adaptation of the old machinery to the new. The boilers and other new machinery contracted for were completed, and ready to be fixed on board, and one instalment of £2,000 had been paid under the contract, when the ship was lost by perils of the sea.

The value of the work actually done by the defendants under the contract amounted to £4,118. The second instalment of £2,000 was subsequently

paid, at the time of which payment the plaintiffs knew of the loss of the ship, but the defendants did not.

The plaintiffs claimed delivery of the boilers and other machinery completed under the contract, and this being refused, brought an action for the detention of the same, or to recover back the £4,000 paid by them to the defendants:

Held, that the contract was an entire and indivisible contract for work to be done upon the plaintiffs' ship for a certain price, from further performance of which both parties were released by the loss of the ship; that the property in the articles manufactured was not intended to pass until they were fixed on board the ship; and that consequently the plaintiffs were not entitled to the boilers and machinery, nor could they recover the £4,000 already paid as upon a failure of consideration. *Anglo, etc. v. Rennie.* 845, 857 *note*.

See FACTOR, 418.
LIEN, 782, 792 *note*.

TREES.

1. Reservation on sale of. 248 *note*.

TRESPASSER.

See MASTER AND SERVANT, 538, 544 *note*.

TRUST

See ASSIGNMENT, 52, 66 *note*.
WILL, 67.

TRUSTS AND TRUSTEES.

1. Where a petition is presented for the appointment of a new trustee under the Trustee Act, 1850, in place of a trustee of unsound mind not so found, service on the trustee of unsound mind is not necessary. *Matter of Green.* 724
2. A testator devised real estate to trustees, their heirs and assigns, upon cer-

tain trusts. The surviving trustee devised all estates vested in him as a trustee to three persons, one of whom, after proving his testator's will, became of unsound mind. A petition was presented for the appointment of new trustees, and for the appointment of a person to convey on behalf of the devisees of the surviving trustee:

Held, that the petition was properly presented in lunacy as well as in chancery. *Matter of Mason*. 725

See EXECUTORS AND ADMINISTRATORS, 871.
GIFT, 780.
WILL, 808.

U

UNDUE INFLUENCE.

See WILL, 76, 101 *note*.

ULTRA VIRES.

1. If the memorandum and articles of association of a company are silent on the subject, it is an implied condition that the shareholders are entitled to rank equal as regards dividend, without preference or priority between themselves; but such implication will be rebutted if the articles of association contemporaneous with the memorandum, contain clear provisions as to the preference or priority of classes of shares.

The memorandum of association of a company incorporated under the Companies Act, 1862, declared that the capital was £2,700,000, divided into 135,000 shares of £20 each. It was provided by the articles of association that the directors might, with the sanction of a special resolution of the company previously given in general meeting, increase the capital by the issue of new shares, such increase of capital to be made in such manner, to such amount, and to be with and subject to such rules, regulations, privileges, and conditions as the company in general meeting should think fit:

Held, on demurrer, that special resolutions authorizing an increase of the

capital by the issuing of preferred shares were not in excess of the powers of the company. *Hutton v. Scarborough, etc.* 798, 802 *note*.

V

VENDOR AND VENDEE.

1. Part of an estate consisted of three farms in Hampshire, and, in that county, valuations between outgoing and incoming tenants for hay, straw, and manure, are made at "fodder value," which is lower than what is called "market value." The three tenants of the farms held under verbal agreements, from year to year, according to the custom of Hampshire. The defendants were devisees of the estate in trust for sale, and, in contemplation of a sale, they gave notice to the tenants to quit at Michaelmas, 1869. The tenants alleged that they had been promised leases by the devisor, and although there was nothing to show that such promises were binding in law or equity, the defendants, thinking the claim binding in honor and conscience, entered into agreements with the tenants, by which, in consideration of their giving up possession of their farms according to the notices, the defendants promised to remit the half-year's rent due at Michaelmas, 1868, to pay £100 to the tenant, and to pay for hay, &c., at the termination of the tenancy, at "market value." In June, 1868, the estate was put up for sale by auction. In the particulars and conditions of sale the three farms were described as in the occupation of the tenants respectively till Michaelmas, 1869, at certain rents, and certain incumbrances, subject to which the sale was made, were specified, viz., land-tax and tithe rent-charge; but no express mention was made of the above-mentioned agreements with the tenants. The conditions stipulated that the property should be taken to be correctly described as to quantity and otherwise, and that if any error, misstatement, or omission should be discovered, the same should not annul the sale, nor should any compensation be allowed, and that the rent or possession should be received or retained and the outgoings

discharged by the vendors up to the 29th of September and from that day by the purchaser. The property was bought in at the sale by auction, and afterwards sold by private contract on the 18th of July, 1868, to the plaintiff. The contract described the property as in the foregoing particulars, and as being purchased subject to the foregoing conditions. At the time of the purchase the plaintiff had no knowledge of the above-mentioned agreements with the tenants. Upon his becoming aware of and objecting in respect of them, it was agreed that he should complete without prejudice to his claim to be indemnified in respect of the agreements to pay market value for the hay, &c. The plaintiff afterwards paid the tenants the amount of the valuations of hay, &c., at market value, and now sought to recover the difference between that and fodder value from the defendants:

Held (reversing the decision of the court below; Amphlett, B., dissenting), that the agreements with the tenants to pay market value were collateral agreements binding only on the defendants personally, and did not amount to fresh demises; and that by the arrangement between the parties, the plaintiff, having paid the tenants' claims, could recover the difference between market and fodder value from the defendants as money paid for their use.

2. Per Amphlett, B. the agreements amounted to fresh demises, as to which there was no duty cast upon the defendants to disclose the terms of them to the plaintiff, and as to which a court of equity would not enforce compensation against the vendors; and, consequently, that the action was not maintainable. *Phillips v. Miller.* 479

See DAMAGES, 298.
INSURANCE, MARINE, 282.
INSURANCE, FIRE, 766.
SALE, 451, 456 *note*, 631.

W

WAIVER.

See FRAUDS, STATUTE OF, 211.

WAREHOUSEMAN.

See CARRIER, 288.
FACTOR, 418.

WARRANTY.

1. The defendants being about to construct a bridge across a tidal river, employed an engineer for the execution of the works, and specifications and plans and drawings of such works were prepared by him. The defendants then issued an advertisement inviting tenders for the execution of the works comprised in the specification, plans, &c. By the specifications the foundations of the piers were to be put in by means of caissons, as shown in a drawing; the form and dimensions of the ironwork and size of rivets to be as shown on the drawing, or to be thereafter supplied by the engineer, &c. By the deed, after reciting the specifications and tenders, the plaintiff covenanted that he would complete the work, according to the terms of the specifications, within three years. Power was given to the defendants' engineer to alter the mode of executing the work, and it was provided that if additional expense was incurred by such alteration, the plaintiff was to receive compensation, to be fixed by the engineer.

The plaintiff commenced the work, and after he had incurred great expense, it was found that the work could not be executed by means of the caissons in the manner specified, and by the directions of the engineer a new mode of putting in the foundations was carried out. The plaintiff having brought an action to recover the value of the work which was thereby thrown away:

Held, by the Exchequer Chamber (affirming the decision of the court below), that no warranty by the defendants that the work could be executed in the manner described in the plans and specifications, was to be implied.

2. Per Blackburn and Mellor, JJ., that the mode of laying the foundation by means of caissons was not part of the contract, but only a mode of carrying it out, which the engineer had power to alter.

8. Per Brett, J., that this mode of laying the foundations was a substantive part of the contract, and that the plaintiff could only be required to pursue a different mode under a new contract.
Thorn v. Mayor. 555

See SALE, 451, 456. *note.*

WATERCOURSE.

1. A natural stream was divided immemorially, but by artificial means, into two branches; one branch ran down to the river Irwell; the other passed into a farm yard, where it supplied a watering trough, and the overflow from the trough was formerly diffused over the surface, and discharged itself by percolation. In 1847, W., the owner of the land on which the watering trough stood, and thence down to the Irwell, connected the watering trough with reservoirs which he constructed adjacent to, and for the use of, a mill on the Irwell. In 1865, W. became owner of all the rest of the land through which this branch flowed. In 1867 he conveyed the mill, with all water rights, to the plaintiff.

In an action brought by the plaintiff against a riparian owner on the stream above the point of division, for obstructing the flow of the water:

Held (affirming the judgment of the court below), that the plaintiff was entitled to maintain the action *Holker v. Porritt.* 520

WILL.

1. Evidence of the declarations of a testator as to whom he intended to benefit, or supposed he had benefited, can only be received where the description of the legatee, or of the thing bequeathed, is equally applicable, in all its parts, to two persons, or to two things. But evidence of the circumstances, the habits, and the state of his family at the time he made the will, is admissible, so as to put the court in the position of the testator, in order to ascertain the bearing and application of the language which he uses, and whether there exist any person or thing to which the whole

description given in the will can be, with sufficient certainty, applied.

Forster Charter, a Northumbrian farmer, made a will in 1859; it was drawn for him, at his request, by the vicar of the parish. The vicar knew, personally, nothing of the testator's family. The testator had had a son named Forster Charter, but this son died unmarried while yet under age. The second son, who thereupon became the elder surviving son, was named William Forster Charter. In 1850 he left home and settled in business at a place about 100 miles distant. He was never known as Forster Charter but was called William or Willie. In 1853 he went to Australia, but returned in 1856. He then resumed his former business at his previous residence, and visited his father only occasionally. It was doubtful whether they were or were not on good terms with each other. The younger surviving son was named Charles Charter. He always lived with his father, except for a very short period in 1859 or 1860, when he absented himself on account of a quarrel in the family. On his return he went on as before, assisting his father, the testator, in the farm business till the father died, which was in 1869. The testator had three daughters; two were married and living away. They were not mentioned in the will. The third was unmarried, and lived with her father. Her name was Barbara. She was mentioned in the will, but was erroneously called "Barbara Forster," though she had never been known by that double name. The testator's residence and farm were, in the will, left to "my son Forster Charter," who was made executor. This name and this description were twice repeated. The will went on to provide an annuity for the wife, to be paid "by my executor Forster Charter," as long as they should "reside together in the same house"; but "should they think proper to live separately" the "said Forster Charter" was to let her live rent free in a neighboring cottage, and furnish her, in addition to the annuity, with necessary supplies; and in case of any dispute between them as to the supplies, the decision of W. D. (a near neighbor and one of the witnesses to the will) was to be final. There was a similar provision as to "Barbara Forster." Probate was granted by the provincial registrar to the elder surviving son, William Forster Charter. On a

citation to recall probate, evidence was received, not only of the state, circumstances, and habits of the family, but of the declarations of the testator as to his intentions with regard to his property:

Held, that this latter evidence was inadmissible:

2. *Held*, by the Lord Chancellor and Lord Selborne, that evidence as to the state, circumstances, and habits of the family was here admissible.
3. And (*dis.* Lord Chelmsford and Lord Hatherley), that the evidence of that kind here given had the effect of correcting what was thereby shown to have been a mistake in the will, i.e., the name of the executor as there written; that the description of what was to be done, of the circumstances under which it was to be done, and of the person who was to act in doing it, of the place where the directions of the will were to be carried into effect, and all the circumstances connected therewith, pointed plainly to Charles, who had always been, and then was, resident with his father, as the person intended to carry the provisions of the will into effect; and that a mistake having been made in the use of one christian name, which the provisions in the will and the evidence, properly admissible, had corrected, the original probate had been rightfully recalled; and that Charles Charter was properly and completely shown to be the person rightfully entitled to the probate.

The difficulty having been created by the act of the testator himself, the costs of both parties were ordered to come out of the estate. *Charter v Charter*.

1, 21 *note*.

4. A bequest to A., and if she shall die unmarried or without children, to B., is an absolute gift to A., defeasible by an executory gift over in the event of A. dying, at any time, unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary.
5. A gift to X. for life with remainder to A., and if A. dies unmarried or without children to B., is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying, at any time, unmarried or without children.
6. There is no rule of construction arising from possible delay in the vesting of a gift, which controls the natural meaning of the terms of the bequest.
7. There is no authority that the words introducing a gift over in the case of the "death unmarried or without children" of a previous taker, do not indicate, according to their natural meaning, death unmarried or without children at any time, or that the ordinary and literal meaning of the words used is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper.
8. Gift of £1,000 consols to A. for her life, after her death to her daughter B., "if B. should die unmarried or without children the consols I here will to revert to C." The will then appointed D. residuary legatee. Both A. and C. died in the lifetime of the testatrix. On her death B. entered into possession, and married, but after some years died without ever having had a child:
Held, that on the death of B. without children the gift over to the residuary legatee took effect, and that it was not affected by the death of C. in the lifetime of the testatrix. The gift to C. failed by lapse, and the residuary legatee became entitled to take all that C., if living at the death of the testatrix, could have taken.
9. The words "I here will to revert to C." indicated a benefit intended for C. by means of an executory limitation over, after enjoyment by a previous taker, and not an alternate gift to take effect, if at all, before the period of enjoyment had commenced.
10. *Per LORD HATHERLEY*: The fourth rule in *Edwards v. Edwards* (15 Beav., 387), would be better stated thus: "The period to which the executory devise will be referred will be the period of the death of the first taker, unless there are directions in the will inconsistent with that supposition."
O'Mahoney v. Burdett. 22
11. A will contained bequests to daughters, failing whom and their issue living at their deaths, to sons, failing whom and their issue living at their deaths, to "Mary H. her executors, &c., and in case Mary H. shall depart this life with-

out leaving any issue of her body living at the time of her decease" over :

Held, that the natural meaning of these words was, the dying of Mary H. without issue living at the time of her death, at whatever time that death might happen; on that event happening the fund went over.

12. And that there was no technical rule of construction which prevented the words from being applied according to this their natural meaning. *Ingram v. Soutten*, 40, 52 note.

13. The expression of an intention accompanying a bequest does not, necessarily, constitute a condition on which the bequest is to take effect, or be defeated. The testator may not do that which would fully effectuate his expressed intention, and yet the bequest may be valid.

14. A testator left certain specified personality to his wife for life, and after her death provided as follows, "I give and bequeath the same, &c., unto University College, London, for the purpose of founding in it a new professorship in Archaeology, for the regulation of which professorship I purpose preparing a code of rules and regulations, which I intend to authenticate under my hand." As soon as convenient after his decease, the fact of his bequest and a copy of the rules were to be communicated to the college, and the college was, within twelve months afterwards, to signify in writing by the president, &c., the acceptance of the said rules; and if the college should decline or refuse to accept the rules, or should not within twelve months signify acceptance thereof, the bequest of the stock and shares was to be wholly null and void, and the stock and shares were to sink into and form part of the residuary estate. The testator died without making any rules :

Held, that the will contained a clear and valid bequest, which was not affected by the subsequent provisions, nor by the non-acceptance of intended rules and regulations, the acceptance of which had, by the act of the testator himself, been rendered impossible.

15. The House will not, on the application of a person not an appellant against a decree, make an alteration in it. If a change in the details of the decree

should be necessary, his application for it should be made in the court below. *Yates v. University College*, 67

16. A will was propounded for probate. A caveat was entered. The Court of Probate directed the case to be tried at the assizes; it was so tried on six issues. The first four required a determination of the fact whether the testator was of sound mind and understanding, capable of making a will; the fifth, whether he knew and approved of the contents of the will; the sixth, whether he knew and approved of the residuary clause. That clause was the last in the will, and, by it, the propounders of the will were made the residuary legatees, and were appointed executors. Evidence having been taken, the judge at the trial asked the opinion of the jurors on every one of the issues. They found for the propounders of the will on the first five issues, but for the opponents on the sixth. No leave to set aside the verdict and enter judgment for the propounders, notwithstanding the verdict on the sixth issue, was reserved, but when the case came before the Court of Probate a rule was obtained to set aside the verdict generally, and have a new trial, or to set aside the verdict on the sixth issue for misdirection. On argument, the judge of the Court of Probate made the rule absolute to enter the verdict for the propounders of the will, and granted probate of the whole will, including the residuary clause :

Held, that this judgment was irregular, and could not be sustained.

17. By the 40th Rule of Proceeding in the Probate Court (1865), made as to contentious business, it is required that any party having pleaded certain pleas as to the competency of the testator and the validity of the execution of the will, shall give particulars in writing, stating shortly the substance of the case he intends to present to the court, and no other defence shall be available. The particulars delivered in this case set forth that, "at the time of the execution of the alleged will the deceased was in a state of mental prostration brought on by habitual drunkenness and disease of the brain, and that when he executed the alleged will he was not conscious of, and did not approve of, the contents of the alleged will or of the residuary clause" :

Held, that these particulars could not

be construed as restricting the defendants to proof that the non-approval of the residuary clause was alone occasioned by mental prostration brought on by habitual drunkenness and disease of the brain.

18. *Per* LORD HATHERLEY: Those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction.

19. There is no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all farther inquiry is shut out. *Fulton v. Andrew*. 76, 101 note.

20. The deceased signed his name and the witness attested such signature on a piece of paper upon which no dispositive part of the will was written. This paper was attached by string to the paper on which the will was written just opposite to the termination of the writing. On the evidence of the witnesses that the papers, to the best of their belief, were in the same state when they signed them as they are now: it was held that the execution was valid.

21. Where a testator has pasted over a whole legacy a piece of paper on which at some time, about which the witnesses can give no information, he has written a new bequest, the court will not order the upper paper to be removed, and will direct the probate to issue in blank as to that legacy; but if the testator has covered over the amount of a legacy only, leaving the legatee's name untouched, the court will consider it a case which comes under the principle of a dependent relative revocation and will endeavor to discover the amount of the legacy originally bequeathed by removing the upper paper. *Goods of Horsford*. 672

22. The deceased by his will directed his executors and trustees (who, however, did not act) to permit his wife to receive the rents and annual profits of his estate, and to carry on his business of a draper for her natural life. She took administration with the will annexed, of the goods of the deceased,

and, in carrying on the business, incurred debts to many persons, more especially to the plaintiff. She died intestate and insolvent, and the parties entitled to the reversion of the deceased's estate having been cited did not accept administration of the unadministered estate of the deceased:

Held, that, as the estate of the widow was primarily liable for the debts contracted by her in carrying on the business, the plaintiff must first take administration to her effects before he could be entitled to a grant of administration *de bonis non* of the estate of the deceased. *Fairland v. Percy*. 678

23. A testatrix gave personal estate in trust for all the nephews and nieces of her late husband who were living at the time of his decease, except A. and B., as tenants in common. Two nephews, who would otherwise have taken under the bequest, died before the testatrix, one before and the other after the will:

Held (affirming the decision of Malins, V.C.), that the gift was to a class, and not to designated persons, and therefore that there was no lapse, but the fund was divisible among those of the class who survived the testatrix. *Dimond v. Bostock*. 763

24. A testator, seized of real estate, and possessed of leasehold collieries which he was working, by his will devised all his real estate, "and also" all his leasehold estates, "and" all his "goods, chattels, and credits" to three trustees, so that they should have the legal estate, upon trust, as to one moiety for his married daughter for life (not to her separate use), then to her husband (one of the trustees) for life, then to her first son absolutely; and as to the other moiety for his only other child, an unmarried daughter, for her separate use for life (without restraint upon anticipation), then to her children, and in default (which happened), upon the trusts of the other moiety. He empowered the married daughter, and her husband, and also the unmarried daughter, to appoint portions to be raised and paid out of his "said real and personal estates respectively." He empowered the unmarried daughter to appoint any part not exceeding one half of the "rents, issues, and profits, interest, dividends, and annual income" of her moiety during the lifetime of any hus-

band for his use. The trustees were empowered to "levy and raise and pay and apply" and for advancement any part or parts of the moieties; and to pay and apply such part as they should think fit of "the income and annual produce" for maintenance. He gave power to the trustees to lease "all or any part" of his "said freehold or leasehold estates" for twenty-one years; to "alter, vary, and transpose" the "state of investment of the property," provided the same shall consist of "real estate, securities upon real estate, or shares in the public funds," for which purpose, and also for the purpose of "raising" such sums of money as it might become "necessary to raise in pursuance of the powers," to "sell and convert into money" all or any part of the "said trust estates," or to mortgage the same. He then empowered the trustees, "in case they should deem it beneficial to do so," to continue the collieries and either to increase or abridge the business thereof, and all losses, costs, charges and expenses of carrying on the business should be "borne, paid, and defrayed" out of his "real and personal estate," and also to procure any lease of the collieries to be renewed, and to continue the business after such renewal.

The testator died in 1884. The son-in-law was the sole proving executor, and was the only acting trustee until the marriage of the unmarried daughter in 1885, shortly after which date her husband was appointed co-trustee. The trustees continued and enlarged the colliery business for thirty-seven years, taking leases of additional collieries, making large profits, and greatly increasing the value of the plant.

Upon suit by the eldest son of the eldest daughter, claiming to have the profits over £4 per cent. on the value of the collieries at the death of the testator capitalized, and made to form part of the estate:

Held, that there were sufficient indications of intention in the will to exclude the operation of the rule in *Howe v. Lord Dartmouth*, and that the tenants for life were entitled to the enjoyment in specie of the produce of all the collieries. *Thureby v. Thureby*.

808

See REAL ESTATE, 837.

WITNESS.

1. A petition for winding up a company having been presented by a shareholder, the secretary filed an affidavit in opposition to the petition, and was cross-examined by the petitioner before a special examiner. On his cross-examination, he was called on to produce the books of the company, which he refused to do. *Malins, V.C.*, accordingly, on the application of the petitioner, made an order that the company, by their secretary, should produce before the special examiner, upon the cross-examination of the secretary, the books and papers which they had had notice to produce:

Held, that the petitioner had a right to the production of the company's books and papers on the cross-examination of the secretary for the purpose of testing his evidence, but for no other purpose; and that the order of *Malins, V.C.*, was right both in form and substance. *Matter of Emma Silver Mining Co.* 701

WRIT OF PROHIBITION.

See PROHIBITION, WRIT OF, 440.

WRONGDOERS.

1. When and how far contribution among enforced. 322 note.
2. When two liable as and when not. *Armstrong v. Lancashire*. 508, 514 note.

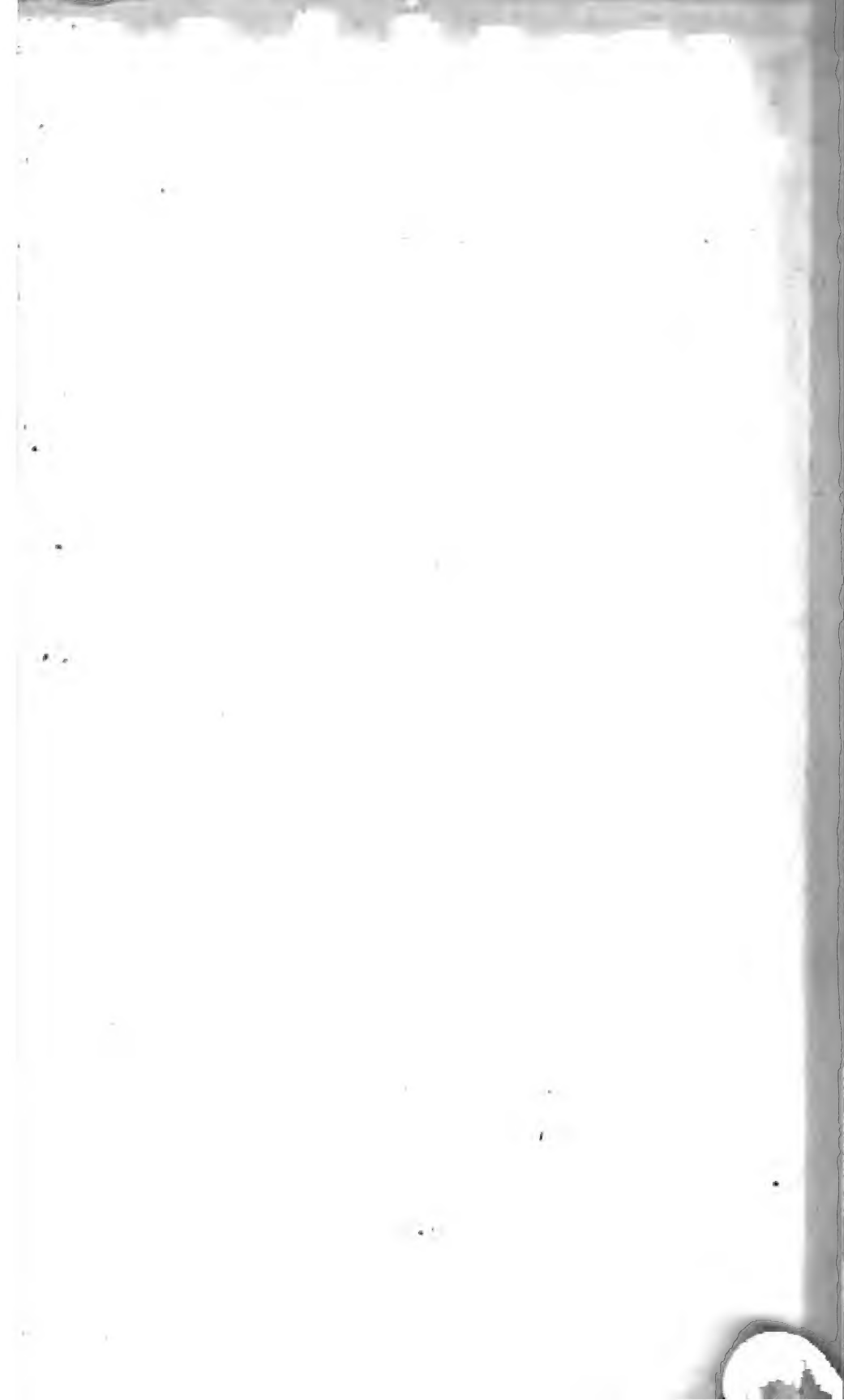
WRONGFUL DEATH.

1. Where a passenger on a railway was injured by an accident, and after an interval died in consequence:

Held, that his executrix might recover in an action for breach of contract against the railway company the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. *Bradshaw v. Lancashire, etc.* 310









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